

Death Penalty

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

FRANCIS HERNANDEZ,
Petitioner,
v.
MICHAEL MARTEL,*
Acting Warden, California State
Prison at San Quentin,
Respondent.

CASE NO. CV 90-4638 RSWL
DEATH PENALTY CASE

ORDER GRANTING IN PART
PETITION FOR WRIT OF
HABEAS CORPUS

This matter is before the Court on petitioner Francis Hernandez's petition for writ of habeas corpus. The Court has read the parties' briefs, together with supporting documentation. For the reasons and in the manner set forth below, the Court hereby GRANTS IN PART the petition for writ of habeas corpus based upon the ineffective assistance of counsel, jury misconduct and cumulative error.

I. Factual Background

An L.A. County jury convicted Francis Hernandez of two counts of first-degree murder, two counts of forcible rape and two counts of sodomy. The jury found true the special circumstance allegations that each murder occurred during the commission of rape and sodomy and that petitioner was convicted of more than

* Michael Martel is substituted for his predecessors as Acting Warden of the California State Prison at San Quentin, pursuant to Federal Rule of Civil Procedure 25(d).

1 one murder. At penalty, the prosecution presented no evidence in aggravation.
2 The defense presented evidence that petitioner was young and drunk at the time of
3 the crimes, that he came from a dysfunctional home, that he probably had
4 borderline personality disorder, that he once helped a friend and that his life should
5 be spared due to the love of his family and friends and his chance for religious
6 salvation. Petitioner testified at the penalty phase, but only about the
7 circumstances of the crime. The jury recommended death. The trial court
8 condemned petitioner. Petitioner was eighteen at the time of the crimes.

9 **II. Procedural History**

10 On direct appeal, the California Supreme Court vacated the multiple-murder
11 special circumstance but otherwise affirmed petitioner's conviction and sentence.
12 *People v. Hernandez*, 47 Cal.3d 315, 253 Cal. Rptr. 199, 763 P.2d 1289 (1988).

13 Petitioner filed a petition for writ of habeas corpus in this Court on August
14 28, 1990. Two years later, petitioner filed his second state habeas petition in the
15 California Supreme Court in order to exhaust claims contained in his federal
16 petition. The state court denied the exhaustion petition several months later.
17 Petitioner returned to federal court, filing an amended petition on March 18, 1993.
18 Litigation concerning a motion to dismiss and a motion for summary judgment
19 ensued for many years. The Court ultimately granted partial summary judgment to
20 respondent. The Court then granted an evidentiary hearing on three issues of jury
21 misconduct and two claims of ineffective assistance of counsel ("IAC"). The
22 Court bifurcated the evidentiary hearing on IAC, directing the parties to address
23 deficient performance and prejudice separately. For six years, the parties
24 conducted a paper evidentiary hearing on juror misconduct and IAC.¹

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26
27
28 ¹ Petitioner filed his third state habeas petition in the California Supreme Court on June 26, 2007. The California Supreme Court denied the petition on the merits on June 11, 2008.

1 **III. Discussion**

2 **A. Mental Health Evidence**

3 Many of petitioner's claims involve mental health evidence, including
 4 whether he had the requisite mens rea at the time of the crime and whether counsel
 5 failed to investigate and present mitigating evidence, among others. The mental
 6 health evidence falls into two categories: evidence gathered before petitioner's
 7 capital trial and evidence gathered and presented as part of petitioner's federal
 8 evidentiary hearing. Both are summarized here.

9 **1. Mental health evidence known before trial**

10 Prior to trial, seven experts had contact with petitioner. Trial counsel had
 11 access to the opinions of each of these experts.

12 Petitioner had been incarcerated in the California Youth Authority ("CYA")
 13 following a conviction for second-degree burglary for breaking into a drug store.
 14 CYA clinical psychologist Audrey Prentiss evaluated petitioner in August of 1979,
 15 about 18 months before the murders took place. Dr. Prentiss found that petitioner
 16 functioned "within the high average range of intellectual ability." (7 CDD² at
 17 P01214.) Dr. Prentiss concluded:

18 [Petitioner] showed confidence in himself and in his abilities and has
 19 good social skills. He tends toward ingratiating behavior that is
 20 somewhat manipulative in quality. His behavior is characteristic of an
 21 antisocial personality in that he is aware of what he is doing, realizes
 22 that he is capable of doing it and goes about doing it with impunity.
 23 He perceives the environment in selfish terms without regard for the
 24 possible consequences that it may have on others. This attitude
 25 appeared to have been related to the fact that this ward has had to
 26 assume a lot of responsibility for himself at a young age and has
 27 learned to manipulate the environment for his own needs. Having had
 28 to assume this responsibility, he had difficulties in accepting the
 pressures that are part of it There were no indications of
 organicity nor of a neurological dysfunction. He is not suicidal or
 homicidal.

(*Id.* at P01215-16.)

² CDD refers to the deposition of Charles Downing.

1 Deputy public defender John Torelli initially represented petitioner for his
2 capital prosecution, though Torelli withdrew before trial due to a conflict. Torelli
3 consulted three mental health experts: clinical psychologist Michael P. Maloney
4 and psychiatrists Michael B. Coburn and Alvin E. Davis.

5 Torelli provided Dr. Maloney with the preliminary hearing transcript; the
6 information, the autopsy, arrest and crime reports; and a five-page account of
7 petitioner's background, which focused mostly on petitioner's adoptive parents and
8 contained very little information about petitioner's biological parents. (JTD³ at
9 P00814-23 (Exhs. 12-16).) Torelli asked Dr. Maloney to "conduct a full
10 psychological evaluation, including all the standard testing that you would
11 normally give to a prospective patient," and sought Dr. Maloney's opinion "as to
12 any major psychological or minor psychological disorder, including, but not
13 limited to, anything involving a defense, such as insanity, diminished capacity or
14 mitigation in the penalty phase." (JTD at P00814.) Dr. Maloney concluded that
15 while petitioner did not appear psychotic, the "data do suggest some potentially
16 serious psychological problems." (*Id.* at P00829.) Dr. Maloney found that
17 petitioner had a "highly pathological profile" and that he had significant elevations
18 on scales measuring hypomania, schizophrenia, psychopathic deviate and paranoia.
19 (*Id.*) People with similar profiles "are often described as having episodes during
20 which they are seen a demanding, confused, hostile, hyperactive, panicky and
21 circumstantial. They may additionally be restless, evasive and high strung." (*Id.*)
22 Petitioner's profile suggested "a fair amount of hostility." (*Id.*) Dr. Maloney
23 explained that people with profiles similar to petitioner "show intense overreaction
24 to normal rejection" and may exhibit a "tendency to be susceptible to sexual
25 identity confusions." (*Id.* (internal quotation marks omitted).) Dr. Maloney stated
26 that "the most likely descriptive diagnosis is schizo-manic episode. This would
27

28 ³ JTD refers to the deposition of John Torelli.

1 suggest a state wherein there is some breakdown in the thinking processes
2 combined with an elevated or manic-like state.” (*Id.* at P00830.) While the most
3 technical diagnosis would be schizophrenia, Dr. Maloney stated that petitioner
4 “shows no overt signs of schizophrenia, but he clearly does appear to have a
5 variety of psychological problems.” (*Id.*) Dr. Maloney concluded as follows:

6
7 The present data suggest that we have an individual who
8 functions in the normal range of general intelligence with no
9 suggestion of any specific cognitive-intellectual or perceptual deficit.
10 He also does not manifest any of the primary signs of a major
11 condition such as psychosis. Present data do, however, indicate that
12 he has significant psychological problems and comes from a very
13 unstable background with multiple noted difficulties relating to his
14 parents as well as problems between his parents.

15 I was able to obtain from Mr. Hernandez a fairly specific
16 account of the events occurring at the time of the present alleged
17 offenses. As you know, at both of these times he was drinking
18 heavily, but he is, nevertheless, able to recall a number of his activities
19 and behaviors.

20 (*Id.* at P00830.) Dr. Maloney testified at the penalty phase. He opined that he
21 “had no data to suggest that [petitioner] would not be responsible for his behavior”
22 at the time of the crime and that petitioner “was drinking at the time [of the crimes]
23 but beyond that, he should have had the capacity to understand what he was
24 doing.” (14 RT 3473; *see also* 14 RT 2374 (“I have no information to indicate that
25 he shouldn’t have been able to appreciate [what he was doing] I have no data
26 to indicate that he was psychotic or severely disturbed at [the time of the crime.]”))

27 Torelli also consulted Dr. Coburn. Torelli sent Dr. Coburn the same
28 materials sent to Dr. Maloney, but also added Dr. Maloney’s report, the transcripts
of petitioner’s confession and petitioner’s statement to his girlfriend. Torelli asked
Dr. Coburn to evaluate whether petitioner was competent to stand trial, insane,
capable of forming the specific intent to commit any crime, particularly rape, and
whether petitioner suffered from any mental disease or defect or an emotional or
psychological disorder that could provide mitigating evidence at the penalty phase.

1 (JTD at P00831-32.) Dr. Coburn interviewed petitioner for a total of two hours.
2 Dr. Coburn concluded that petitioner was sane at the time of the offenses, that
3 petitioner “would have been capable of forming all of the requisite intents involved
4 in varying degrees of homicide” and that “there is no indication that he would have
5 lacked the capacity to form any specific intent in regards to the sexual aspects of
6 the case.” (*Id.* at P00841.) Dr. Coburn’s primary diagnosis of petitioner was
7 “[s]imple intoxication due to alcohol at the time of the offenses.” (*Id.* at P00840.)
8 Dr. Coburn also opined that petitioner suffered from “[v]ery severe mixed
9 personality disorder with passive-aggressive and antisocial components” and that
10 he experienced “[m]inimal environmental stress at the time of the offenses” along
11 with “[m]oderate early childhood psychosocial stressors.” (*Id.* at P00840.) Dr.
12 Coburn suggested that, using the data provided by Dr. Maloney, trial counsel could
13 argue that petitioner “did not in fact intend to kill, but merely intended to ‘quiet’
14 the victims. Given his passive-aggressive or explosive and antisocial demeanor,
15 one could technically argue that his need to quiet them was paramount, and that it
16 was his intolerance of defiance which led to the acts.” (*Id.* at P00841.) Dr. Coburn
17 added, however, that he “did not harbor an opinion with reasonable certainty that
18 would allow [him] personally to testify in that” manner. (*Id.* at P00841.) Dr.
19 Coburn did not testify at trial.

20 Finally, Dr. Davis evaluated petitioner. Torelli sent Dr. Davis the same
21 materials sent to Dr. Coburn. Torelli asked Dr. Davis to evaluate whether
22 petitioner was competent to stand trial, insane, whether the defense of diminished
23 capacity could succeed and whether petitioner suffered from any mental disease or
24 difficulty that could provide mitigating evidence at the penalty phase. (*Id.* at
25 P00844-46.) Dr. Davis diagnosed petitioner with passive-aggressive personality
26 disorder, which involves “anti-social and aggressive acting out,” including drug
27 and alcohol abuse. (*Id.* at P00547.) Dr. Davis concluded that petitioner was sane
28 at the time of the offenses and “had the mental capacity to form specific intent,

1 premeditate, and harbor malice,” though “his capacity to deliberate or to maturely
2 reflect was impaired by intoxication.” (*Id.* at P00547.) Dr. Davis noted that it was
3 plausible that petitioner did not intend to kill the victims, but that his confession
4 showed a lack of overt emotion, consistent with antisocial personality disorder.
5 (*Id.* at P00548.) Dr. Davis did not testify at trial.

6 At some point after obtaining these expert opinions, Torelli withdrew.
7 Charles Downing took over petitioner’s representation. Downing⁴ represented
8 petitioner for many months preceding trial through sentencing. Downing’s
9 representation is the subject of petitioner’s IAC claims. Torelli transmitted his file,
10 which included correspondence with Drs. Maloney, Coburn and Davis, as well as
11 each expert’s report, to Downing. Downing consulted three additional experts:
12 clinical and forensic psychologist Faye Girsh, gastroenterologist Amer Rayyes and
13 forensic pathologist S. M. Rabson.

14 Downing provided Dr. Girsh with the reports of Drs. Maloney, Coburn and
15 Davis, as well as Torelli’s correspondence with each expert. Downing informed
16 Dr. Girsh that he was going to pursue an insanity defense because “Hernandez is
17 either insane or he will be gassed.” (5 CDD P00521.) Trial counsel explained his
18 theory of the case to Dr. Girsh:

19
20 I have what I am sure is a hopelessly simplistic view. I think
21 that Francis was one way or another killing his mother. I also am
22 convinced that he is an individual who is crazy that somehow or
23 another keeps his insanity in check so long as he is sober but, with the
24 ingestion of alcohol, whatever it is that permits him to appear sane
25 vanishes and his personality reverts to that which is normal for him,
26 namely nuts. I guess in my simplistic view this is sort of the converse
27 of diminished capacity. In that condition one who is normally sane
28 ingests alcohol or whatever and does something crazy with the loss of
inhibitions or whatever. I should note that these offenses were
committed at a time when diminished capacity was available as a
defense.

⁴ The terms “trial counsel” and “counsel” refer to Charles Downing.

1 (*Id.* at P00524.)

2 Dr. Girsh did not provide trial counsel with a written report, but the record
3 contains trial counsel's notes from a conversation he had with Dr. Girsh before
4 trial. The notes include Dr. Girsh's assessment of petitioner:

5 Personality [illegible] a real puzzle: Francis is an apparent anti-
6 social personality disorder type = sociopath. Of 15 criteria, he meets
7 12. Can't diagnosis as such due to age. Why age makes a difference?
8 Because, until age 24 or so, personality malleable, can change.
9 Maturation is best therapy for sociopathic personality. He is,
10 presently, classified as a juvenile with such tendencies.
11 Characteristics of syndrome is that he doesn't care about anything:
kills just for hell of it, tortures to cause pain, etc. Also, explosive,
intermittent violent conduct; that's him. [Illegible] drives through
plate glass window in van for burglary. That is sociopathic stuff, not
what I want. Get Book: "Clockwork Orange"—a profile of a true
sociopath.

12 (*Id.* at P00518.) While counsel worried that the jury's rejection of a diminished
13 capacity defense at the guilt phase would harm the penalty phase, Dr. Girsh
14 disagreed. (*Id.* at P00517.) Counsel questioned whether he could use Dr. Girsh to
15 suggest that petitioner killed the victims by accident but without putting on a full-
16 blown diminished capacity defense. That strategy would force the prosecution to
17 ask questions about specific intent on cross examination, ultimately supporting a
18 diminished capacity jury instruction.

19 Dr. Girsh testified at the penalty phase. She opined that petitioner was
20 "essentially out of control" when he committed both crimes. (14 RT 3583.)
21 "[A]pparently at the time that [petitioner] suffocated or strangled the women, he
22 had lost control. He was in some kind of a fit of rage or panic or something that
23 was different from his usual state." (*Id.* at 3584.) Petitioner's behavior was
24 associated with substance abuse disorders and borderline personality disorder.
25 (*Id.*) A person with borderline personality has periods of self-destructive behavior
26 because the individual is not sure of his identity. (*Id.* at 3585.) Dr. Girsh hesitated
27 to diagnose petitioner with borderline personality disorder, as the diagnosis can
28 only be made once a person is 18. (*Id.*) Because petitioner was "just 18" at the

1 time of the murders, “the diagnosis really would not have applied.” (*Id.*) On
2 cross-examination, Dr. Girsh testified that self-destructive behavior also was a
3 symptom of antisocial personality disorder. (*Id.* at 3599.)

4 Dr. Rayyes, a gastroenterologist specializing in alcoholism and drug
5 addiction, testified at the penalty phase. Counsel and his wife both had suffered
6 from alcoholism. Before trial, Dr. Rayyes had conducted an intervention with
7 counsel’s wife, and, later, with counsel. Dr. Rayyes diagnosed petitioner with
8 alcoholism. Dr. Rayyes testified that petitioner would have been “severely
9 impaired” at the time of the crimes and, accordingly, that petitioner would have
10 been unable to form the specific intent to kill. (12 RT 3069-70.) On cross
11 examination, Dr. Rayyes initially repeated his belief that an alcoholic who has been
12 drinking cannot form a specific intent to kill. (13 RT 3082.) When pressed,
13 however, Dr. Rayyes testified that it is “possible” for an inebriated alcoholic to
14 form the specific intent to steal or to kill, and that an intoxicated alcoholic can form
15 the specific intent to commit rape or sodomy. (12 RT 3083, 3084, 3085.)

16 Downing also consulted Dr. Rabson, a forensic pathologist. Trial counsel
17 sent Dr. Rabson the autopsy photographs and reports, a transcript of the coroner’s
18 testimony from the preliminary hearing and petitioner’s statement to the police.
19 Trial counsel asked Dr. Rabson to look for any evidence that either of the victims
20 was moved after death, if sexual intercourse could have been consensual, if the bite
21 marks on the breasts of the victims could have occurred during intercourse or if
22 they were post-mortem, if the vaginal and anal injuries could have occurred post-
23 mortem and if Dr. Rabson would come to any different conclusions from the
24 coroner. (5 CDD at P00530.) A document in trial counsel’s file memorializes
25 counsel’s discussion with Dr. Rabson. Trial counsel noted that “Dr. Rabson tends
26 to be somewhat judgmental, probably due to his [J]ewish upbringing, and has
27 formed the opinion that Hernandez is an obvious, clear sociopath and ought to
28 spend the rest of his life behind bars. (*Id.* at P00532.) Dr. Rabson concluded that

1 the condition of the victims' bodies was consistent with asphyxiation or
2 strangulation, that Bristol may have been moved after she died, that the intercourse
3 in both cases likely was not consensual and that the bite marks and the various
4 vaginal and anal injuries were inflicted pre-mortem. (*Id.*) Dr. Rabson opined that
5 the coroner conducted the autopsies in a professional and competent manner, other
6 than her failure to investigate Ryan's abnormally large heart, which did not
7 contribute to the victim's death. (*Id.*) Dr. Rabson did not testify at trial.

8 **2. Mental health evidence presented in evidentiary hearing**

9 As part of the evidentiary hearing, petitioner presented the testimony of
10 psychologist June Madsen Clausen, psychiatrist Dorothy Otnow Lewis,
11 criminologist Sheila Balkan, clinical psychologist Charles Sanislow and
12 neuropsychologist Ruben Gur. Respondent presented the testimony of just one
13 expert: clinical psychologist Daniel Martell.

14 **a. Psychologist June Madsen Clausen**

15 Dr. Clausen is a psychology professor at the University of San Francisco,
16 where she teaches advanced courses in clinical child psychology, counseling
17 psychology, abnormal psychology and child maltreatment. She conducts research
18 on children, adolescents and young adults who have been placed in the child
19 welfare system due to abuse or neglect and provides outpatient psychotherapy to
20 trauma survivors. (Clausen Decl. at 1, ¶ 2.) Petitioner asked Dr. Clausen to take
21 his social history and to evaluate the effect his background had on both his
22 psychological development and his functioning as an adult, including at the time of
23 the crimes. (*Id.* at 2, ¶ 4.) Dr. Clausen reviewed witness declarations, educational
24 reports, probation and Youth Authority reports, court records, psychological
25 reports and other materials. She interviewed petitioner five times for a total of ten
26 hours. She also interviewed petitioner's adoptive mother. (*Id.*)

1 Dr. Clausen provided a detailed social history of petitioner:

2
3 Francis Hernandez is an adopted child . . . Francis was a child born
4 into unfavorable circumstances. He is the product of a brief, tumultuous
5 union between a depressed, troubled fourteen-year-old girl and a disturbed,
6 drug-addicted eighteen-year-old boy. Both of Francis's [biological] parents
7 reportedly have family histories of mental illness. During Francis's in utero
8 development, his mother consumed marijuana and alcohol, and his father
9 was episodically violent toward his mother. These circumstances often
10 contribute to neurological and psychological vulnerabilities of the kinds that
11 later complicated Francis's development. He was a child born with special
12 needs.

13 Francis's mother gave him up for adoption at birth, and soon
14 after he was placed in the home of an adoptive mother and father[,]
15 both of whom were struggling with severe psychiatric and
16 psychological problems. Both Francis's parents were raised and
17 formed their ideas of family life in violent homes bereft of warmth,
18 caring, nurturing, and attention to the developmental needs of others.
19 In addition, Francis's [adoptive] mother also suffered from
20 schizophrenia and was episodically psychotic throughout Francis's
21 childhood. She attempted suicide more than once, spent months-long
22 periods in psychiatric hospitals, and returned home so heavily
23 medicated that she was unable to attend to her own daily living
24 requirements, let alone Francis's. She also failed to adhere to the
25 prescribed regimen of psychotropic medication and she became
26 psychotic, at times violently.

27 Francis's father was a paranoid man prone to sudden, violent,
28 and angry outbursts, who never learned to recognize the emotional
needs or the distress of others. He was, by all accounts, either unable
or unwilling to recognize the gravity of living with a psychiatrically ill
spouse and a troubled young child. During Francis's childhood, his
father regularly left [Francis] home alone with his mother, often for
week-long periods.

20 (*Id.* at 2-3, ¶¶ 6-8.) Petitioner's birth mother, Patricia ("Pat") Ramos (formerly
21 Urbano, originally Myers), has a family history of depression, bipolar disorder and
22 chemical dependency, all heritable conditions. (*Id.* at 4, ¶ 12.) Pat takes Paxil, an
23 antidepressant, and has taken Elavil, another antidepressant. She suffers from
24 anxiety and panic attacks, as well insomnia, for which she takes tranquilizers
25 nightly. (*Id.* at 7 ¶ 20.)

26 In addition, petitioner's biological father and his family also exhibited signs
27 and symptoms of mental illness. Dr. Clausen provided the following information:
28

Francis'[s] biological father, Anthony (Tony) Marquez, was the last of eleven children born to Paulino and Loretta Marquez, immigrants from Mexico. Anecdotal evidence gathered from surviving family members suggests that, of Francis's paternal grandparents, both exhibited behaviors consistent with those of individuals with affective disorders.

Family members report that at least twenty-three of [petitioner's biological paternal] cousins have had drug problems. Two have been diagnosed with schizophrenia, one with depression, and one was so extremely hyperactive as a child that he chewed on his hand, nearly capsized a refrigerator onto himself, and had to run circles around a building before he could enter and visit family members inside—behavior, not incidentally, that bears striking clinical resemblance to that of Francis Hernandez as a child.

Like many members of his family, Francis's biological father, Tony Marquez, has struggled with drugs and mental illness throughout his life. Tony is a sixty-year-old man whose limited intellectual functioning and obvious psychiatric impairments keep even a minimal level of self-sufficiency beyond his reach. He has spent most of his life incarcerated. According to Social Security[,] his only reported income was \$74.20 in 1963 and \$74.93 in 1967. Tony Marquez is a man whose impairments have made it impossible for him to function independently within the law and without the use of drugs.

(*Id.* at 9, ¶ 24; 13-14, ¶ 40; 14-15, ¶ 41.) Tony's prison records describe psychological symptoms that are consistent with clinical depression, mania, substance dependence, and florid psychosis. (*Id.* at 18, ¶ 51.) Prison staff described his condition as "acute psychosis" and as a "disassociation from reality." (*Id.* at 19, ¶¶ 55 (internal quotation marks omitted).) Tony's condition was sufficiently alarming to prison staff that he was transferred to the prison psychiatric ward after tearing up his sheets. (*Id.* at 19, ¶¶ 55 (internal quotation marks omitted).) Tony's psychosis continued:

[H]aving apparently failed to respond to the treatment offered by San Quentin, Tony was transferred to the California Medical Facility (CMF) in Vacaville, California, a hospital for acutely ill inmates of the California prison system. Within a few days of his arrival at CMF, he was written up for tearing up his bedding. The disciplinary report for the incident notes that he did so "to decorate his house."

1 While he was being treated at CMF, Tony was administered
 2 Prolixin and Thorazine—two powerful antipsychotic medications.
 3 The doctors at CMF discussed the use of electro-convulsive therapy
 on Tony. This consideration suggests that his psychosis was severe and that
 it failed to remit under his prescribed medication.

4 (*Id.* at 20-21, ¶¶ 58-59.)

5 Dr. Clausen also provided information about petitioner's adopted mother:

6
 7 Naomi Schilling (now Kuhl)[,] Francis Hernandez's adoptive
 8 mother, also inherited a predisposition to mental illness. Naomi's
 9 parents, a prodromally schizophrenic mother and a depressed,
 10 alcoholic father, created a household characterized by extreme
 isolation, frequent violence and delusional religious fanaticism—the
 same poisonous atmosphere in which Francis would later be
 immersed.

11 One of Naomi's lifelong challenges manifested itself as a
 12 cognitive deficit. Even when she was a very young girl, Naomi's family
 13 considered her "different." During her childhood, she was
 14 uncommunicative, shy and visibly "unhappy all the time." Naomi recalls
 15 being socially isolated and exceptionally shy, attempting to pass the days in
 school with as few words as possible Naomi suffered from extreme
 social impairments and members of her family apparently worried that she
 might be retarded, and her mother openly stated that she thought Naomi was
 slow

16 Naomi's longstanding severe mental illness went undiagnosed
 17 until she was thirty years old when the doctors overseeing her months-
 18 long inpatient hospitalization in an Orange County psychiatric
 19 institution verified that she was suffering from schizophrenia. Since
 20 that time[,], she has been psychiatrically hospitalized no fewer than ten
 21 times. Over the course of these hospitalizations, medical and mental
 health professionals have documented many details of Naomi's life.
 These documents show that Naomi internalized and replicated the
 psychopathologies with which she grew up, in particular her family's
 violence, its obsession with sex, and its unwavering religious
 fanaticism.

22 (*Id.* at 21, ¶ 61; 28-29, ¶¶ 77-78 (citations omitted).) Additionally, Dr. Clausen
 23 gathered information about petitioner's adoptive father.

24
 25 Frank Hernandez, Francis Hernandez's adoptive father, also
 26 came from a severely troubled family governed by the complicated
 27 interaction of a number of developmentally harmful
 28 psychopathologies. Among these were: the unwavering refusal to
 acknowledge and address grave familial problems; a complete failure
 to discuss and contextualize the issue of racism while residing in a
 community known for its remarkable racial prejudice; a mutually
 destructive and hostile relationship between the family's parents; the

1 noteworthy anger that underlay much of the family's disproportionate
 2 reactions to one another and to the outside world; verbal and physical
 abuse; and the father's emotional abandonment of his children.

3 (*Id.* at 31, ¶ 81.)

4 Naomi and Frank married on January 4, 1958. (*Id.* at 42, ¶ 108.) Petitioner
 5 was born on March 10, 1962. (*Id.* at 44, ¶ 113.) He was placed with Naomi and
 6 Frank on May 17, 1962. (*Id.*) Petitioner was a hyperactive baby and small child.
 7 (*Id.* at 44, ¶ 113-14.) He had incredible energy. (*Id.* at 46, ¶ 117.)

8 More than thirty years after petitioner left his preschool, petitioner's former
 9 teacher described petitioner's family as "troubled to an unforgettable degree." (*Id.*
 10 at 50, ¶ 130 (internal quotation marks omitted).) Petitioner's preschool teacher
 11 stated that petitioner was "overwhelmed by stimuli and by interactions with other
 12 children; extremely labile; unable to sit still, finish projects or move from one
 13 activity to another; unable to interpret the social cues of other children; socially
 14 isolated; unable to read and respond to other children in a way that allowed
 15 friendship to happen; prone to seeing the most benign gesture as a threat; and
 16 subject to extreme tantrums that were beyond those of a normal child and in which
 17 he entered his own world." (*Id.* at 51, ¶ 131 (internal quotation marks omitted).)
 18 When petitioner was four and a half, his preschool teacher suggested that
 19 petitioner's parents seek the help of a psychologist or psychiatrist. (*Id.* at 51,
 20 ¶ 131.) Petitioner's father refused. (*Id.*)

21 Naomi and Frank attempted to adopt another child in April 1966. (*Id.* at 53,
 22 ¶ 137.) The adoption agency notes reflect the problems petitioner's family faced:

23
 24 The interviews revealed that Naomi had been candidly
 25 uncomfortable about the fact that Francis was an adopted child, that
 26 she was incapable of giving directions to her home, barely able to
 27 convey simple thoughts, and dependent on Frank to the extent that the
 28 adoption worker wondered what this young woman would do, or how
 she would respond in an emergency situation when her husband was
 not around The case worker wondered if there might be some
 neurological basis for Francis's uncontrolled activity After an
 initial round of interviews, the adoption agency felt obliged to explore
 Naomi's mental health. Later, during a home visit, Naomi was unable

1 to control Francis and ended up crying and needing the consolation of
2 the case worker.

3 (*Id.* at 54, ¶ 139 (internal quotation marks omitted).) The case worker also
4 described the family as living in social isolation. (*Id.* at 54, ¶ 140.) Naomi and
5 Frank named petitioner's preschool teacher as a reference despite her earlier
6 criticism of their parenting; she did not recommend them as suitable for adopting
7 another child. (*Id.* at 54-55, ¶ 141.) The adoption agency referred the family for
8 counseling. (*Id.* at 55, ¶ 142.)

9 The counselor found petitioner to have a short attention span, excessive
10 energy, a mind that was too active and an inability to differentiate between fantasy
11 and reality. The psychologist recommended that petitioner undergo neurological
12 testing, that Frank and Naomi receive marital counseling and that Naomi receive
13 psychological help. (*Id.* at 56, ¶ 143.) Naomi, Frank and petitioner attended
14 monthly counseling sessions for a while but did not complete the recommended six
15 months. (*Id.* at 57, ¶ 145.) Ultimately, the adoption agency denied Naomi and
16 Frank's application to adopt another child and closed the case. (*Id.* at 58, ¶ 149.)

17 One month after the denial of the application to adopt a second child, Naomi
18 attempted suicide for the first time. She was hospitalized for several months and
19 diagnosed with schizophrenia during that time. She was treated with Mellaril,
20 which prevented her from functioning normally. (*Id.* at 54, ¶¶ 150-52.) Her family
21 described her as a zombie who was flat in affect, moved in slow motion, dragged
22 her feet and was like a walking dead person. (*Id.* at 60, ¶ 154.) She was suicidal
23 upon her release from the hospital and fantasized about hanging herself. She
24 attempted to overdose on sleeping pills. (*Id.* at 58, ¶ 155.)

25 Naomi disciplined petitioner in unconventional ways. When petitioner acted
26 up, Naomi sat on him until he calmed down. Naomi also forcibly administered
27 enemas to petitioner as punishment. The purpose of the enemas was to keep
28 petitioner clean and to calm him down when he was hyper. (*Id.* at 57, ¶ 146.)

1 Frank disciplined petitioner by hitting him with a belt; Frank also gave petitioner
2 boxing lessons when he was a school-aged child. (*Id.* at 58, ¶ 147.)

3 Naomi continued to struggle with her mental health, especially when she
4 stopped taking her medication. In one incident, Frank dropped Naomi off at her
5 sister Barbara's house. Barbara and her husband described Naomi's behavior that
6 night as "bizarre, terrifying, shocking, crazy as a person could be, psychotic, a
7 nightmare, something from a scary movie, sad, frightening, [] horrible, a horror,
8 gruesome and the kind of thing that any normal parent would protect his son from
9 seeing." (*Id.* at 65, ¶ 166.) After that night, Barbara would not allow her children
10 to be alone with Naomi and they worried about what impact Naomi's behavior
11 would have on petitioner. (*Id.* at 66, ¶¶ 167-70.) Frank did not appear to protect
12 petitioner from Naomi during these episodes. (*Id.* at 67, ¶¶ 171-72.)

13 In another incident, Naomi threatened Frank's mother with a knife. Naomi
14 demanded that her mother-in-law kneel and pray. When her mother-in-law fled,
15 Naomi chased her mother-in-law outside with the knife. (*Id.* at 67, ¶ 173.)

16 By age ten, petitioner withdrew from home life and came home after dark.
17 (*Id.* at 71, ¶ 185; 74 ¶ 190.) Petitioner's friends describe his home as depressing,
18 unhappy, awful, messy, dark and full of junk. (*Id.* at 71-73, ¶¶ 185-88.)

19 Petitioner did not fit in with other children. He was isolated, frequently
20 depressed and socially awkward. (*Id.* at 74-78, ¶¶ 191-2.) By thirteen, he was
21 drinking beer daily and smoking marijuana many times a day. (*Id.* at 78, ¶ 202.)

22 When petitioner was eleven, he broke into his school. (*Id.* at 79, ¶ 203.) At
23 thirteen, he was caught with a marijuana pipe. He was declared a ward of the court
24 at fourteen. (*Id.* at 79, ¶ 204.) Later that same year, Naomi suffered another
25 psychotic episode. (*Id.* at 80, ¶ 206.) She was hospitalized for several months,
26 during which she had sexual encounters with two male patients and said mass in
27 the patient lounge. (*Id.* at 81, ¶ 206.) She started smoking and believed the devil
28 was entering her body through cigarette smoke. (*Id.* at 79, ¶ 204.)

1 Close in time to Naomi's psychotic break, petitioner was suspended from
2 school for fighting. Weeks later, petitioner arrived at school under the influence of
3 marijuana and was suspended again. A month later, petitioner crashed his
4 motorcycle that he had been driving daily, with his father's permission, even
5 though he was only fifteen and without a license. (*Id.* at 81, ¶ 207.) Naomi came
6 home for several weeks after her hospitalization but ultimately left to live with her
7 schizophrenic mother in Atascadero. Petitioner was fifteen. Naomi divorced
8 Frank and never lived with him or Francis again. (*Id.* at 82, ¶ 208.)

9 With Naomi gone and Frank largely absent or uninvolved, petitioner's home
10 became a hangout for drug dealers and users. (*Id.* at 82, ¶ 209.) People bought and
11 sold drugs, including cocaine and marijuana. Petitioner had access to and was
12 using PCP, cocaine, amphetamine, LSD, marijuana, hash, mushrooms, heroin and
13 an array of pharmaceutical drugs. The house became even filthier and had broken
14 windows that went unfixed. Frank did nothing to stop the things going on in his
15 home; he blamed the neighbors' complaints on racism. (*Id.* at 82-83, ¶ 209-11.)

16 At age fifteen, petitioner began attending high school. Two months later, he
17 crashed his motorcycle, resulting in x-rays of his ankle, tibia and fibula. He was
18 sent to an alternative learning center. (*Id.* at 84, ¶ 212.)

19 At sixteen, petitioner was arrested with two friends for malicious mischief.
20 His friends were bailed out quickly, but it took several days for Frank to learn that
21 petitioner was in jail. (*Id.* at 84, ¶ 213.)

22 At seventeen, petitioner crashed his motorcycle again. He lost
23 consciousness, suffered involuntary convulsions and was taken to the hospital by
24 ambulance. He had x-rays of his skull, face, chest and arm. (*Id.* at 85, ¶ 215.)

25 A month later, petitioner was arrested for breaking into a drug store. He was
26 held in custody and sent to the California Youth Authority ("CYA"). While
27 petitioner was incarcerated, Frank moved in with his girlfriend and sold his house.
28 He bought petitioner a van to live in after his release. (*Id.* at 85, ¶¶ 215-16.)

1 Petitioner was released in April 1980. (*Id.* at 86, ¶ 217.) He received his driver's
 2 license the same day. (*Id.* at 87, ¶ 218.) In May 1980, he was cited for possession
 3 of marijuana and driving with an open container of alcohol. (*Id.* at 87, ¶ 218.) In
 4 July 1980, he received another traffic citation. (*Id.* at 87, ¶ 218.)

5 Between April 1980 and February 1981, petitioner dated Heidi Williams.
 6 Heidi told petitioner she was pregnant with petitioner's baby. Petitioner proposed
 7 to Heidi, and she accepted. Heidi told petitioner she miscarried. (*Id.* at 87, ¶ 219.)
 8 In December 1980, the police told petitioner that he could no longer keep his dog,
 9 Prince, in his van. (*Id.* at 87, ¶ 221.) Later that month, petitioner was pulled over
 10 for a traffic citation. There was a warrant for petitioner in connection with change
 11 stolen out of a parked car. The police impounded petitioner's car, which was his
 12 home. It contained his clothing and possessions, as well as a large amount of
 13 marijuana that belonged to a drug dealer. (*Id.* at 88, ¶ 223.)

14 In mid-January 1981, Heidi broke up with petitioner. On January 20, 1981,
 15 the DMV revoked petitioner's license. In late January or early February 1981,
 16 petitioner ran his van into an apartment building. Around the same time, Edna
 17 Bristol and Kathy Ryan were murdered. (*Id.* at 89, ¶¶ 225-26.)

18 From April 1980 until his arrest for the underlying crimes in 1981,
 19

20 [Petitioner] was an eighteen-year-old, unemployed, parolee who was
 21 homeless, isolated from his family, drug addicted and living in a van.
 22 Other than an uncertain relationship with a girlfriend and the
 23 continued association with a homeless, drug abusing friend, Francis
 24 had little social support or contact. He no longer shared a home with
 25 either of his parents. He was not in school. He was not incarcerated.
 He was not in any of the various forms of treatment that teachers,
 social workers, and mental health professionals had been urging for
 him since he was a toddler Francis was a young man with
 insufficient social and psychological resources attempting to grapple
 with unmanageable stressors.

26 (*Id.* at 86, ¶ 217.)

27 In addition to creating petitioner's social history, Dr. Clausen also provided
 28 a psychological analysis. Dr. Clausen pointed to literature demonstrating that

1 children raised by a schizophrenic parent tend to suffer from cognitive, behavioral,
2 emotional and social difficulties. (*Id.* at 93-94, ¶ 235.) In addition, the key task
3 during the first eighteen months of life is to form an attachment to the primary
4 caretaker, but that process cannot take place with a psychotic primary caretaker.
5 (*Id.* at 94, ¶ 236.) The failure to form a healthy primary attachment results in a
6 consequent failure to develop basic trust. (*Id.*) Naomi failed to form an attachment
7 bond to petitioner. (*Id.* at 95-96, ¶¶ 237-40.)

8 From ages two to six, children should develop a sense of autonomy and
9 initiative. Again, Naomi's psychosis prevented petitioner from developing
10 appropriately, leaving petitioner anxious, depressed, exposed to physical danger,
11 prone to uncontrolled behavior and resorting to self-reliance and pseudo-maturity.
12 (*Id.* at 96-100, ¶¶ 241-46.) Naomi and Frank's inability to cope with petitioner's
13 normal attempts to develop independence and initiative-taking resulted in rage,
14 beatings with a belt, yelling and the forcible administration of enemas. (*Id.* at 100-
15 01, ¶¶ 247-48.) Naomi engaged in inappropriate play with petitioner, such as by
16 tying him up with rope. She allowed petitioner to take dangerous items to school
17 for play, including screwdrivers, other tools, wood, rope and toy guys. (*Id.* at 101,
18 ¶¶ 249.) Dr. Clausen described petitioner as "a young child without a healthy self-
19 concept who was not equipped with basic skills in social comprehension and
20 interpersonal communication, and who did not understand the expectations and
21 consequences in his environment." (*Id.* at 103, ¶¶ 251.)

22 From ages six to twelve, a child's primary task is to develop a sense of
23 industry. (*Id.* at 103, ¶ 252.) For petitioner, these years were filled with tension,
24 chaos, violence, the deterioration of a psychotic mother and an often-absent father.
25 (*Id.* at 104-07, ¶¶ 254-61.) To make up for his parents' shortcomings, petitioner
26 was charged with great responsibility, including learning how to turn off the power
27 in case of an emergency at age five and learning how to drive a car at age 10. (*Id.*
28 at 107, ¶ 262.) Petitioner developed symptoms of anxiety and depression. (*Id.* at

1 109, ¶ 264.) Petitioner started staying away from home as much as possible. (*Id.*
2 at 109, ¶ 265.) During his elementary and pre-teen years, he had a great deal of
3 freedom, no supervision, no chores and no family dinners or obligations. (*Id.* at
4 109, ¶ 266.) Petitioner began to self-medicate by using marijuana and alcohol on a
5 regular basis in the summer after fifth grade and by getting drunk and high every
6 day by seventh grade. (*Id.*)

7 From ages twelve to eighteen, a child's primary task is to develop a sense of
8 personal identity. (*Id.* at 110, ¶ 267.) Petitioner used drugs regularly as an
9 adolescent, with his parents' knowledge; they did nothing about it and Naomi
10 recalls that she may have smoked marijuana with her son. (*Id.* at 110, ¶ 268.)
11 Naomi continued to suffer from schizophrenia and engaged in sexually
12 inappropriate behavior, such as by having a man she met while hospitalized come
13 to her home to have sex. (*Id.* at 112, ¶ 273.) Petitioner started acting out. He
14 fought and used drugs at school and was arrested for burglary. (*Id.* at 113, ¶ 274.)
15 Petitioner's mother left the family without saying goodbye. (*Id.* at 113, ¶ 275.)
16 With petitioner's mother gone and his father rarely home, petitioner started using
17 drugs and alcohol more regularly. (*Id.* at 113, ¶ 276.) The house petitioner and
18 Frank lived in was filthy and in shambles. (*Id.* at 113-14, ¶ 277.) Petitioner was
19 arrested for breaking into a drug store and then spent ten months in the CYA. (*Id.*
20 at 114, ¶ 278.) Less than a year after his release, petitioner was arrested for the
21 underlying crimes. (*Id.*)

22 Petitioner also struggled to distinguish reality from fantasy:
23

24 The evidence suggests that Francis's genetic predisposition for
25 impaired reality testing, together with his chronic exposure to his
26 adoptive mother's psychotic thoughts and chaotic, disorganized
27 behavior, and with his father's paranoid thinking and minimization of
28 his wife's symptoms, resulted in a marked inability to accurately
perceive his social environment. Francis grew up to be an adolescent
who was confused by the signals he received from people around him
and, when confused, experienced distortions of reality and, at times,
became paranoid.

(*Id.* at 117-18, ¶ 283.) In addition, petitioner dissociated as a way of coping with the world around him. Francis had a genetic predisposition to dissociative disorder, dissociated at various times during his childhood and experienced incredible stress in the weeks leading up to the crimes. (*Id.* at 118-19, ¶¶ 284-86; 121, ¶ 291.) Petitioner knows about many of the circumstances of the crime, but he cannot actually remember many of them. (*Id.* at 119-21, ¶¶ 287-89.) Petitioner's confession, despite the level of detail, contains evidence that petitioner dissociated during the crimes. (*Id.* at 122, ¶ 292; 123 ¶ 295.) The taped statement also suggests that petitioner's thought processes were psychotic during the crimes. (*Id.* at 122, ¶ 294.) Petitioner's testimony at the penalty phase provides further evidence of dissociation. (*Id.* at 123-24, ¶ 296.)

b. Psychiatrist Dorothy Otnow Lewis

Dr. Lewis is a professor of psychiatry at New York University School of Medicine and a clinical professor at the Yale University Child Study Center. (Lewis 8/15/03 Decl. at 1, ¶ 2.) Dr. Lewis evaluated petitioner's neuropsychiatric, medical and family background. She also considered how those factors may have affected petitioner's conduct on the night of the crimes, including his capacity to form the specific intent to commit rape and murder. (*Id.* at 1, ¶ 1.)

Dr. Lewis interviewed petitioner for three days in 1990 and two days in 2003. She interviewed petitioner's adoptive mother, Naomi; adoptive father, Frank; biological mother and father; adoptive paternal aunt; and adoptive paternal uncle. She also reviewed the declarations of petitioner's adoptive and biological relatives, as well as others. (*Id.* at 2, ¶ 3.)

Dr. Lewis provided a detailed social history of petitioner, emphasizing the "biopsychosocial factors" that affected petitioner's mental state at the time of the crimes. She explained her approach as follows:

It is impossible to understand Francis Hernandez's psychiatric condition throughout childhood and during adolescence, the

1 development period at which time the offenses were committed,
2 without a clear understanding of the interactions among his genetic
3 vulnerabilities to severe mental illness which he inherited from his
4 biological mother and father, the effects of in utero exposure to
alcohol and drugs, repeated head injuries beginning in early childhood, and
an upbringing in a psychotic, physically and sexually abusive, and severely
neglectful adoptive family.

5 (*Id.* at 4, ¶ 8.) Dr. Lewis considered the mental health of petitioner’s biological
6 relatives, which included major depression and bipolar mood disorders. (*Id.* at 6-
7 12, ¶¶ 11-30.) “[O]ne can trace psychiatric illness of psychotic proportions
8 through three generations of Francis Hernandez’s paternal biological relatives as
9 well as three generations of his maternal biological relatives.” (*Id.* at 12, ¶ 30.)

10 Dr. Lewis also reviewed the psychiatric history of petitioner’s adoptive
11 family. Naomi was raised by a “psychotic,” “violent, [] strict disciplinarian” who
12 “harbored religious delusions (e.g. being raped and having her vagina probed by
13 the Devil).” (*Id.* at 13, ¶ 33.) Ultimately, Naomi’s mother was diagnosed with
14 chronic schizophrenia, paranoid type. (*Id.* at 14, ¶ 34.) Dr. Lewis concluded that
15 “Naomi’s childhood experience of being raised by a violent, delusional mother
16 undoubtedly influenced the psychotic manner in which she treated” petitioner. (*Id.*
17 at 13, ¶ 33.) Naomi’s father was both “a depressed, unfeeling, verbally abusive
18 man—a ‘hermit’ who isolated his wife and children from the rest of society” and
19 simultaneously “a hard drinking man about town who infuriated his wife with his
20 overspending and affairs with women.” (*Id.* at 13, ¶ 32.)

21 Naomi was always considered different as a child: shy, withdrawn, unable
22 to express herself, slow and possibly retarded, paranoid, confused, disoriented and
23 unable to relate to others. While she was diagnosed with thyroid dysfunction as a
24 teen, Dr. Lewis opines that these symptoms relate to Naomi’s developing
25 psychosis. (*Id.* at 14, ¶ 36.) Naomi had difficulty coping as an adult. Her family
26 and her in-laws described her as immature, incompetent and unable to cope with
27 the demands of her life. (*Id.* at 14, ¶ 37.) Naomi attempted suicide when petitioner
28 was 5; she was admitted to a psychiatric hospital for three months and diagnosed

1 with schizophrenia. She was hospitalized in a psychiatric facility for four months
2 when petitioner was seven and involuntarily committed again when petitioner was
3 eight. Hospital records describe her as “agitated, confused, homicidal and
4 delusional.” (*Id.* at 15, ¶ 39 (internal quotation marks omitted).) After Naomi’s
5 first hospitalization, Frank removed all of the kitchen knives from the house. (*Id.*
6 at 15-16, ¶ 39.) When medicated, Naomi could barely function. The house was
7 dark and very disordered, and people described Naomi as weird or zombie-like.
8 (*Id.* at 17, ¶ 42.)

9 Naomi acted so bizarrely at times that her sister and brother-in-law never left
10 their children alone with Naomi and feared for petitioner’s safety in his mother’s
11 care. (*Id.* at 17, ¶ 41.) Naomi believed that petitioner was possessed by the devil;
12 she gave him enemas to make him clean and to improve his behavior. (*Id.* at 18, ¶
13 45.) Frank would help get control of petitioner and have him bend over the tub
14 with his bottom in the air so that Naomi could insert the enema nozzle up
15 petitioner’s rectum. Naomi would make petitioner hold the liquid as long as he
16 could, up to fifteen minutes, before she would allow him to relieve himself. “This
17 particular manifestation of Naomi’s psychosis is important because of its relevance
18 to aspects of the offense in question (i.e. inserting objects into his victims’ bodily
19 orifices).” (*Id.*) “Children who have had objects shoved into their rectums
20 repeatedly against their will are at a high risk of perpetrating similar acts on
21 others.” (*Id.*)

22 Naomi also behaved in sexually inappropriate ways around petitioner, such
23 as wanting to do a striptease in front of petitioner, dressing seductively and
24 bringing home a former fellow patient, with whom she had sexual intercourse
25 while hospitalized, at a time when petitioner may have been there. (*Id.* at 18, ¶ 46.)
26 Frank believed that Naomi may have molested petitioner, noting that petitioner and
27 his mother shared a bed when petitioner was nine and ten. (*Id.* at 18-19, ¶ 46.) Dr.
28 Lewis described petitioner’s relationship with his adoptive mother as follows:

1 The influence of [petitioner's] mother's sexually provocative,
2 inappropriate behaviors, anally assaultive acts, and the emotional reaction
3 they engendered in Francis, clearly contributed to the nature of . . . the
4 offenses. Children who have been repeatedly stimulated sexually and/or
5 teased sexually by an adult, especially by a mother, are at a very high risk of
6 acting out sexually and aggressively toward women other than their
7 abusers . . . [O]ne cannot overemphasize the effects on Francis, a
8 psychiatrically vulnerable child to begin with, of being raised by a
9 chronically psychotic, sexually abusive mother.

10 (*Id.* at 19, ¶ 46.)

11 Since leaving petitioner and his father, Naomi has been hospitalized many
12 times, often following suicide attempts. She has spent years in group homes and
13 residential treatment homes, as well as some time homeless on the streets of San
14 Francisco. (*Id.* at 17, ¶ 43.)

15 Frank, petitioner's adoptive father, was raised in a violent home in which the
16 father drank to excess. (*Id.* at 19, ¶ 47.) Relatives and others describe Frank as
17 quiet, withdrawn, socially isolated and oblivious to his surroundings, including
18 Naomi and petitioner's mental health problems. (*Id.* at 20, ¶ 49.) Frank also
19 suffered from paranoia. (*Id.* at 20-22, ¶¶ 50-54.) He had grandiose opinions about
20 petitioner's capabilities, including buying petitioner a motorbike powerful enough
21 for an adult at age five, allowing petitioner to back a van out of the driveway at age
22 eight, to drive a car at age ten and to drive a motorcycle without a license as a
23 teenager. (*Id.* at 22, ¶ 55.) Frank also abandoned petitioner. Frank expected
24 petitioner to take care of his mother when he was just five years old. (*Id.* at 22,
25 ¶ 56.) When Naomi left, Frank left fifteen-year-old petitioner to fend for himself,
26 leaving food in the refrigerator or money on the table. (*Id.* at 23, ¶ 57.)

27 Dr. Lewis also reviewed petitioner's medical and psychiatric history.
28 Petitioner experienced multiple events that are known to increase vulnerability to
psychiatric illnesses, social and academic maladaptation and violence, including his
biological mother's ingestion of alcohol and marijuana. (*Id.* at 23, ¶ 59.)
Petitioner's hyperactivity, his adoptive mother's incompetence and his father's

1 poor judgment combined to put petitioner at great risk for injuring himself. (*Id.* at
2 23, ¶ 60.) Petitioner's injuries included the following: riding a tricycle into an in-
3 ground pool at age two; ingesting a bottle of baby aspirin around the same age;
4 crashing a mini-bike into a wall at age five, requiring stitches to his chin; numerous
5 bike and skateboard accidents during his elementary and middle school years that
6 resulted in head injuries; eleven motorcycle accidents in his teens, including one on
7 which his helmet was dented. (*Id.* at 24, ¶ 60.) These sorts of head injuries likely
8 exacerbated the psychiatric symptoms of bipolar disorder. (*Id.* at 24, ¶ 61.)

9 Dr. Lewis attributed petitioner's early hyperactivity to any of the following:
10 the drugs and alcohol to which petitioner was exposed in utero, early
11 manifestations of mania that petitioner inherited from his episodically psychotic
12 biological parents, the effects of inadequate mothering or a combination of all
13 three. (*Id.* at 25, ¶ 63.) As a preschooler, petitioner engaged in psychotic behavior,
14 including misperceiving reality, misreading social cues, attacking other children
15 without provocation, bringing dangerous items to school, engaging in dangerous
16 acts, being unable to switch from one activity to another without extreme distress
17 and experiencing episodes of uncontrollable yelling and crying. (*Id.* at 26-27, ¶¶
18 67-68.) Dr. Lewis described these behaviors as "characteristic of a traumatized
19 child who is out of touch with reality" and "characteristic of severely
20 psychiatrically ill young children who have witnessed and/or been victims of
21 extreme, bizarre violence." (*Id.* at 27, ¶¶ 67-68.) Moreover, these behaviors are
22 also characteristic of dissociative children. (*Id.* at 27, ¶ 69.) Dr. Lewis explained
23 that "[r]ecurrently traumatized, dissociative children exhibit trancelike states,
24 impaired memory for behaviors and events, and dramatic and instantaneous
25 fluctuations in behavior." (*Id.* at 28, ¶ 70.) "They often have aggressive
26 overreactions in response to neutral stimuli because they are misperceived as
27 threats." (*Id.*)

28 Due to petitioner's bizarre behavior, the adoption agency referred five-year-

1 old petitioner for a psychological evaluation. Joseph Sawaya observed that
2 petitioner had endless energy; was restless and demanding; acted out, suffered
3 from a short attention span; performed poorly on a test of central nervous system
4 functioning, indicating possible brain impairment; was destructive and fantasized
5 profusely. (*Id.* at 28-29, ¶ 72.) These observations and test results show that
6 petitioner was psychotic and that “he was a danger to himself and others and
7 desperately needed removal from his home and psychiatric hospitalization. Instead
8 of hospitalizing and treating this frantic, very disturbed, five year old, however,
9 Francis was allowed to remain in his psychotic adoptive home.” (*Id.* at 29, ¶ 73.)
10 The physical condition of petitioner’s home added to petitioner’s problems.
11 Dr. Lewis testified that “[n]o child raised in such an environment could be
12 expected to develop normally. He or she would have no models for normal social
13 interaction and no experiences of the kind of ongoing nurturing and cognitive
14 stimulation that every human being requires for normal adaptation.” (*Id.* at 30, ¶
15 76.)

16 Petitioner’s struggles continued into adolescence. (*Id.* at 31, ¶ 78.)
17 Petitioner was paranoid and experienced rapid, wild mood swings. (*Id.* at 32,
18 ¶¶ 70, 78-79.) He also experienced trance-like states, unrelated to the use of drugs
19 or alcohol. (*Id.* at 32-33, ¶ 80.) Petitioner’s rapid mood swings, trance-like states
20 and strikingly different use of penmanship and spelling depending on mood
21 suggest pathological dissociation, “characteristic of people who, as children,
22 experienced severe[,] ongoing, intolerable abuse, usually of sexual as well as
23 physical and emotional in nature.” (*Id.* at 33, ¶ 81.) Dr. Lewis concluded that
24 petitioner’s history with sudden self-injury, property damage, impaired memory
25 and trance-like episodes related to the murder of Kathy Ryan. Petitioner intended
26 to see her later in the week, and nothing indicated he intended to kill her on the
27 night of the crime. The murder does not seem premeditated, but, rather, suggests
28 that petitioner was in a dissociative state. (*Id.* at 33-34, ¶ 82.)

1 Dr. Lewis also diagnoses petitioner with bipolar mood disorder. (*Id.* at 34-
 2 36, ¶ 84; *see also* 2 Lewis Depo. at 278 (“[W]hether you wish to call it the manic
 3 phase of bipolar mood disorder or the manic phase of Schizoaffective,
 4 schizophrenic disorder . . . he was severely psychiatrically ill at the time . . . and
 5 the psychotic nature of the illness was manifested in childhood, which tells you
 6 about the severity of the disorder.”).)

7 No single factor accounts for petitioner’s behavior at the time of the crimes.
 8 (Lewis 8/15/03 Decl. at 36, ¶ 85.) A combination of several factors worked
 9 together, including that petitioner suffers from bipolar mood disorder and appeared
 10 to be in a manic or hypomanic state at the time of the offenses; petitioner’s struggle
 11 with dissociative symptoms, which include violent responses to misperceptions and
 12 impaired or distorted memory; multiple head injuries; and being raised by a
 13 psychotic mother and a paranoid father prone to physical aggression in an abusive
 14 home. (*Id.* at 36-37, ¶ 85.) Moreover,

15
 16 Francis Hernandez had [a] constellation . . . of intrinsic
 17 neuropsychiatric vulnerabilities (i.e.,] bipolar mood disorder,
 18 pathological dissociation, history of numerous head injuries) and
 19 extreme intra-family stressors (i.e.,] an upbringing in a psychotic,
 20 physically and sexually abusive, and severely neglectful household)
 21 which engendered his extreme[,] uncontrollable[,] violent acts. The
 knowledge of these biopsychosocial vulnerabilities and the
 appreciation of their role in Francis Hernandez’s offenses are vital to
 understanding his compromised mental functioning on the nights of
 the murder in question.

22 (*Id.* at 37, ¶ 86.) In sum, petitioner’s “capacity to premeditate and deliberate[and]
 23 his capacity to form the specific intent to rape and kill, was substantially
 24 impaired.” (*Id.* at 37, ¶ 87.)

25 Moreover, Dr. Lewis opined that testimony about petitioner’s mental health
 26 could have provided helpful evidence at the penalty phase. The difference between
 27 the psychotic household in which petitioner was raised and the “minimally
 28 nurturing, stimulating and protective environment required for normal

1 development and adaptation would have been powerful information to present
 2 during the mitigation phase of Francis's trial." (*Id.* at 30, ¶ 77.) Moreover, "[i]t is
 3 hard to imagine how a more genetically resilient child could have weathered the
 4 family environment and adapted appropriately to society, much less a child with
 5 Francis's inherent vulnerabilities to mental illness." (*Id.* at 31, ¶ 77; *see also* 2
 6 Lewis Depo. at 283 ("[W]hen you get a vulnerable child who is then adopted into
 7 or raised in a psychotic environment in which you don't know what your mother or
 8 your father will be like and in which there are such stressors . . . then you are
 9 creating an aberrant human being, a person who cannot function the way other
 10 people do.").)

11 **c. Criminologist Sheila Balkan**

12 Criminologist Sheila Balkan obtained her doctorate in sociology, with a
 13 specialization in criminology, deviant behavior and mental health. (Balkan 8/15/03
 14 Decl. at 1, ¶ 2.) The stated purpose of her declaration is to provide a social history
 15 of petitioner and identify the issues in his life and background that help explain the
 16 crime. (*Id.* at 1-2, ¶ 4.) Dr. Balkan reviewed the trial testimony of Drs. Rayyes,
 17 Girsh and Maloney. (*Id.* at 2, ¶ 6.) She also reviewed the findings of Dr. Lewis,
 18 including Dr. Lewis's 1990 assessment of petitioner and her 2003 declaration. (*Id.*
 19 at 2, ¶ 4.) Dr. Balkan conducted interviews of petitioner, his former girlfriend, his
 20 childhood friend Morris Silverstein and the mother of childhood friend Douglas
 21 "Eddie" Duffey. (*Id.* at 4, ¶ 9.) Dr. Balkan also reviewed declarations, notes of
 22 interviews or both for many individuals, including petitioner's biological parents
 23 and other biological relatives, his adoptive parents, other members of his adoptive
 24 family, petitioner's preschool teacher and the parents of petitioner's former
 25 girlfriend, among others. (*Id.*) Dr. Balkan reviewed extensive records, including
 26 petitioner's adoption, school, CYA, prison, juvenile criminal and probation
 27 records, as well as earlier psychological assessments of petitioner. (*Id.* at 4, ¶ 10.)

28 Dr. Balkan's declaration provided a social history of petitioner's life, very

1 similar to that provided by Drs. Clausen and Lewis. (*See id.* at 5-77.) She added
 2 that the those who knew petitioner found it hard to believe that he committed the
 3 crimes because they were so out of character. (*Id.* at 78-79, ¶¶ 262-63.)

4 Dr. Balkan criticized the trial testimony of Drs. Rayyes, Girsh and Maloney,
 5 stating that “none of these experts were given adequate information to form
 6 opinions that would have be[en] helpful to the jury’s understanding.” (*Id.* at 2-3,
 7 ¶¶ 6-8.) Ultimately, she concurred in Dr. Lewis’s diagnosis of petitioner with
 8 psychosis, bipolar disorder and dissociation. (*Id.* at 2, ¶ 5; 77-78, ¶¶ 260-261.)
 9 Dr. Balkan concluded:

10 While the role of each of the factors that Dr. Lewis identifies is
 11 difficult to quantify, it seems safe to say that if Francis’ genetic
 12 susceptibility to mental illness or the high degree of dysfunction and
 13 neglect in the home in which he was raised were removed, the
 14 offenses would never have occurred. Evidence of this can be seen in
 15 the 22 years that Francis has conformed himself to prison life. He is a
 16 model prisoner and, although he states that he has become mad on
 17 occasion, he has always controlled his temper. One of the sad facts of
 18 Francis’ life is that he has been on his own since as early as he could
 19 walk and talk. Lacking any supervision or structure, Francis’
 20 yearning for security can be seen in the reports of the many adults that
 21 Francis reached out to. With Francis’ impaired understanding of the
 22 social interactions and the lack of any involvement from either parent,
 23 it is only with having been incarcerated that Francis has been given
 24 the benefit of a set of comprehensible social rules within which he can
 25 form expectations and conform his conduct.

26 (*Id.* at 80, ¶ 265.)

27 **d. Psychologist Daniel Martell**

28 Dr. Martell is a clinical psychologist, retained by respondent as a “forensic
 neuropsychological expert.” (Martell Decl. at 1, ¶ 4.) He reviewed the California
 Supreme Court opinion, trial counsel’s file, various lay declarations, the penalty
 phase transcript, the declarations of Drs. Clausen, Balkan and Lewis, and the
 examination notes of Drs. Lewis and Clausen. (*Id.* at 1-2, ¶ 5.) Dr. Martell
 examined petitioner for a full day in 2003. (*Id.* at 2, ¶ 6.)

Dr. Martell administered various tests to petitioner. (*Id.* at 2, ¶ 7.) Petitioner
 provided a personal history, which included “reports of significant mental illness in

1 his biological and adoptive families; lack of parental supervision; extensive drug
 2 and alcohol abuse beginning at an early age (5th grade); early onset of conduct
 3 disorder; and recurrent criminal and antisocial behavior.” (*Id.* at 2, ¶ 8.) Dr.
 4 Martell offered the following summary of his evaluation of petitioner:

5
 6 [Petitioner’s] thoughts were expressed in a logical, coherent and goal
 7 directed fashion, with no evidence of formal thought disorder. He was
 8 in good contact with reality, and reported no history of psychotic
 9 symptoms (e.g., hallucinations or delusions) except during periods
 10 w[h]ere he has been intoxicated with drugs/alcohol. Emotionally, his
 11 observable affect was stable and mildly blunted. There was no
 12 evidence of symptoms of any major affective disorder (e.g.,
 depression or mania) and he denied any affective symptomatology
 with the exception of periods when he has been intoxicated with drugs
 and/or alcohol. His underlying mood was euthymic. He denied any
 history of dissociative symptoms, except during periods when he was
 intoxicated with drugs and/or alcohol.

13 (*Id.* at 2-3, ¶ 8.)

14 Based on his evaluation of petitioner, Dr. Martell described the “claim that
 15 Mr. Hernandez suffers from psychosis, bipolar disorder, brain impairment, and/or
 16 dissociation” as “unsupported and misleading.” (*Id.* at 4, ¶ 13.) Dr. Martell
 17 explained that “examining doctors have not found [petitioner] to be so impaired,”
 18 citing to the evaluations by Joseph Sawaya and Drs. Prentiss, Minton, Davis and
 19 Maloney. On cross-examination, however, Dr. Martell admitted that none of those
 20 individuals had access to records concerning petitioner’s biological parents or to
 21 declarations from petitioner’s biological and adopted families, preschool teacher,
 22 lifelong friends or ex-girlfriend’s parents. (Martell Depo. at 131-134.) Dr. Martell
 23 concluded that his examination of petitioner, “which failed to indicate any major
 24 mental disorder or significant brain impairment other than Antisocial Personality
 25 Disorder” was consistent with the historical evaluations of petitioner. (Martell
 26 Decl. at 5, ¶ 17.) Moreover, Dr. Martell opined that petitioner’s “extensive history
 27 of alcohol and substance intoxication appears to completely account for and
 28 underlie the symptoms described by Dr. Lewis and attributed to Bipolar disorder,

1 psychosis, or dissociation.” (*Id.*) Dr. Martell testified that petitioner’s troublesome
 2 childhood behaviors “are well captured by the diagnosis of Conduct Disorder,
 3 Childhood-Onset Type.” (*Id.*) Moreover, petitioner’s genetic predisposition to
 4 mental illness “does not mean that he actually manifests any mental disorder,” as
 5 “it is still most likely that the offspring will not manifest the disorder.” (*Id.* at 6,
 6 ¶ 18.) Dr. Martell added that petitioner may meet the diagnostic criteria for Sexual
 7 Sadism. (*Id.* at 6, ¶ 19.) Finally, Dr. Martell concluded that “other than being in a
 8 state of intoxication, there was no major mental disorder operating to ‘substantially
 9 impair’ Mr. Hernandez’s thinking or behavior at the time of the crime.” (*Id.* at 7,
 10 ¶ 20.)

11 There are serious reasons to doubt the credibility of Dr. Martell’s testimony.
 12 Petitioner’s experts have questioned Dr. Martell’s methodology. For instance,
 13 Dr. Lewis criticized Dr. Martell for “tak[ing] issue with the fact that Francis has
 14 close relatives who suffer from severe mood disorders, because they have not been
 15 diagnosed at a hospital,” but notes that “any experienced clinician would recognize
 16 the kinds of signs, symptoms and behaviors . . . [as] characteristic of bipolar
 17 (manic-depressive) or schizoaffective disorders. (Lewis 5/8/04 Decl. at 4-5, ¶ 7.)
 18 Dr. Lewis also commented on Dr. Martell’s testimony that petitioner had a thirty
 19 percent risk of having bipolar disorder, when a prominent study by the National
 20 Child Institute concluded that children with two bipolar parents and extended
 21 families with mood disorders had nearly a one hundred percent risk of developing
 22 a similar disorder. (*Id.* at 5-6, ¶¶ 8-11.) Dr. Lewis also scrutinized Dr. Martell’s
 23 failure to note the increased risk of mental illness petitioner suffered due to in utero
 24 exposure to alcohol and drugs, as well as head injuries throughout childhood and
 25 adolescence. (*Id.* at 7, ¶ 14.)

26 Although he offered opinions about petitioner’s childhood and possible
 27 diagnosis with child-onset conduct disorder, Dr. Martell admitted that child and
 28 adolescent psychology were not his major interest, that he had not treated any child

1 or adolescent for at least ten years, that he had not studied or written in the area for
 2 ten to fifteen years and that he had never sought board certification in that area.
 3 (*Id.* at 281; *see also* Lewis 5/8/04 Decl. 8-9, ¶¶ 20-21.) Dr. Martell did not note the
 4 clinical significance of petitioner's absence of childhood memories, which,
 5 according to Dr. Lewis, is "characteristic of severely abused, dissociative children,
 6 adolescents and adults." (Lewis 5/8/04 Decl. at 9, ¶ 23.) Dr. Lewis rejected Dr.
 7 Martell's diagnosis of petitioner with conduct disorder, noting that he dismissed
 8 the indicators of petitioner's early severe psychopathology observed by petitioner's
 9 preschool teacher and others. (*Id.* at 10, ¶ 26.) Dr. Martell failed to rule out
 10 organic, bipolar, schizophrenic, dissociative and other psychiatric disorders before
 11 diagnosing petitioner with conduct disorder. (*Id.* at 11, ¶ 28.)

12 Dr. Martell testified that the administration of enemas to petitioner was not
 13 sexual abuse. (Martell Depo. at 432-33.) Dr. Lewis strongly disapproved of this
 14 conclusion:

15
 16 Another sign of Dr. Martell's lack of clinical experience with
 17 children and adolescents is his assertion that being given ritual enemas
 18 twice a week throughout childhood by a psychotic mother is not
 19 indicative of sexual abuse. Repeatedly holding a child down and
 20 inserting objects into that child's rectum is a form of sodomy.
 21 Whether or not the perpetrator intends to sexually abuse the child or
 not is irrelevant. The acts are experienced by the child as repeated
 anal sexual assaults. Any minimally trained child psychiatrist, child-
 psychologist or pediatrician would recognize the sexually abusive
 nature of the enemas to which Francis was subjected for years.

22 (Lewis 5/8/04 Decl. at 11, ¶ 30.) In addition, Dr. Lewis criticized Dr. Martell's
 23 evaluation of petitioner with respect to physical abuse. Dr. Lewis observed that
 24 when petitioner began to report instances of physical abuse that would lead to
 25 dissociation, Dr. Martell cut the answer short or ignored petitioner's answer. (*Id.*
 26 at 11-12, ¶ 31.) For instance, petitioner reported to Dr. Martell that once his father
 27 beat him so badly that he broke his thumbs, but Dr. Martell did not ask for
 28 elaboration. Instead, he asked if petitioner's parents got along. Later, Dr. Martell

1 asked petitioner if he was ever abused, but petitioner had already reported being
2 beaten frequently with a strap on his bare buttocks and that he once broke his
3 thumbs at his father's hands. (*Id.* at 12, ¶¶ 31-32.) According to Dr. Lewis, a
4 clinician trained in child psychiatry, psychology or pediatrics "would know that
5 dissociation occurs to enable a child to forget abuse and its sequela[.]. Hence, one
6 must rely on scars, records and the accounts of observers to obtain an accurate
7 picture of the abused individual's past." (*Id.* at 12, ¶ 33.)

8 Dr. Lewis noted that in evaluating petitioner, Dr. Martell elicited important
9 indicators of dissociation, but he either ignored or failed to recognize them. (*Id.* at
10 13, ¶ 35.) Dr. Lewis listed many such examples in her declaration. (*Id.* at 13-15,
11 ¶¶ 36-41.) Similarly, Dr. Lewis catalogued the many instances in which petitioner
12 provided Dr. Martell with information suggestive of bipolar disorder, which
13 Dr. Martell either did not explore or address. (*Id.* at 16-17, 18, ¶¶ 43-46, 48.)
14 Dr. Lewis concluded:

15
16 Francis Hernandez provides Dr. Martell with ample evidence of
17 severe physical and sexual abuse, of severe dissociative
18 psychopathology, and manic or hypomanic states. That Dr. Martell
19 fails to appreciate the significance of the signs and symptoms and
20 behaviors he elicited on interview is puzzling. In all likelihood, his
21 lack of clinical experience with children and adolescents explains his
22 inability to recognize the significance of what he is told. Similarly,
probably for the same reasons, he misinterprets the copious evidence
of severe psychopathology in school records, the early psychological
testing, and the declarations of family and friends. Dr. Martell elicited
valuable information. One would be reluctant to believe that he
deliberately ignored or distorted what he saw.

23 (*Id.* at 18, ¶ 49.)

24 In addition, Dr. Lewis explained that to make a valid diagnosis, the examiner
25 must consider evidence of the patient's early behavioral, psychological,
26 educational and medical history. The examiner must take the observations of
27 family and friends seriously and must be able to recognize the early signs and
28 symptoms of childhood and adolescent mental illness. She faulted Dr. Martell for

1 his failure to do these things. (*Id.* at 19, ¶ 50.) Dr. Lewis also observed that the
 2 “neuropsychological and personality testing on which Dr. Martell relies are not
 3 adequate diagnostic tools for recognizing the existence of severe psychopathology”
 4 in a capital defendant. (*Id.* at 19, ¶ 51.)

5 Dr. Lewis also rejected Dr. Martell’s diagnosis of petitioner with antisocial
 6 personality disorder, given the evidence of bipolar disorder and significant
 7 dissociative psychopathology. (*Id.* at 19, ¶ 52; *see also* Gur 2/8/05 Decl. at 39
 8 (noting that during the developmental and formative years, the behavior of
 9 individuals who have a genetic vulnerability to a psychiatric disorder and who
 10 acquire a head injury is often confused with and misinterpreted as conduct
 11 disorder).) In fact, Dr. Lewis concluded her 2004 declaration with the following
 12 statements:

13
 14 Finally, a word should be said about Francis Hernandez’s
 15 genuine sense of guilt. In my relatively long career studying violence,
 16 I have never heard any other condemned offender articulate, not only
 17 the magnitude of his offense, but also the depth of his remorse as does
 18 Francis Hernandez. Francis says it far better than I could paraphrase
 19 it. Francis asks himself, “Am I sorry it happened? Hell yes.”
 20 Dr. Martell then asks simply, “Why?” Francis replies: “Because I
 21 actually—because apparently, without knowing what I was doing or
 22 not knowing why, apparently killed a friend. I also killed another girl,
 23 Edna—I’m sorry for myself because it fucked up the rest of my life.
 24 But it cut short her life, cut short their lives. Fucked up their families,
 25 fucked up my family. Had all kinds of repercussions. Besides being
 26 wrong, besides being something . . . that I never thought I would do,
 27 yeah, all kinds of things. Why do I feel sorry? There’s nothing I can
 28 do about it.

22 He continues, “What can I do? Even to say I’m sorry to the
 23 family? I feel sorry for the family. I am sorry. I’m not adverse to
 24 saying it, but I don’t think I should, because I don’t think it would do
 25 any good.” The following words bespeak a kind of compassion that is
 26 rarely observed in the violent offender population. Francis has,
 27 clearly, thought as much about the bereaved families of his victims as
 28 he has about himself and what the effect of an apology might be. He
 goes on: “I think it would probably be worse for them than for
 me—to hear from me, ‘I’m Sorry’—You remind them, it’s like a slap
 in the face. He’s still alive, I’m sitting here [while] their child’s dead.
 You can never replace a child.” These are not the words of a
 sociopath.

1 (Lewis 5/8/04 Decl. at 21-22, ¶¶ 57-58.)

2 Additionally, Dr. Lewis took issue with Dr. Martell's testimony about
3 recessive genes; about his opinion that there is one "gene" for bipolar disorder,
4 when it is thought to result from the interactions of multiple genes coupled with
5 environmental factors; his failure to appreciate the effects of an adverse
6 environment on the manifestation of mental illness in petitioner; his testimony that
7 abused children have a four percent chance of developing aggressive tendencies
8 when numerous studies show that neuropsychiatrically vulnerable children are at a
9 high risk of developing abusive behaviors if they have been abused or raised in
10 violent homes; and his unsupported suggestion that petitioner may suffer from
11 sexual sadism. (*Id.* at 7, ¶ 15; 8, ¶¶ 16-17; 8, ¶ 19; 19-20, ¶¶ 53-54.)

12 Dr. Ruben Gur, a psychologist retained by petitioner, also questioned
13 Dr. Martell's methodology. Dr. Gur summed up his criticism this way:
14 Dr. Martell "reaches his conclusions without properly pursuing several
15 conspicuous leads to the contrary disclosed by the results of the tests he gave, and
16 without integrating many of the details of Mr. Hernandez's history contained in the
17 lay witness declarations with the results of his testing." (Gur 6/8/04 Decl. at 7-8,
18 ¶ 13.) Moreover, "[t]here is a discrepancy between data obtained in the interview
19 and testing and contained in the social history documents on the one hand, and the
20 direction of the interview and interpretation relating to the issue of memory and
21 executive functions on the other." (*Id.* at 8, ¶ 14.)

22 Dr. Gur reviewed Dr. Martell's tape-recorded examination of petitioner. Dr.
23 Gur testified:

24 I was, frankly, quite perturbed by the whole interview and the
25 tone of it starting from the get go. It was not a clinical interview. It
26 did not follow any of the standards that I learned about how to
27 conduct a clinical interview. It was almost designed to hide any sign
28 of psychopathology, which is the opposite of the purpose of a clinical
interview He goes on to present it as almost a legal interrogation
rather than a clinical interview, including this strange statement that
has a veiled—thinly veiled threat, where he says something to the
effect that, if you are straight with me, I'll be straight with you.

1 It's just, I have never heard anybody, any clinician, in training
 2 or after training or in teaching, who would make any statement like
 3 that when trying to interview someone in a clinical—in an effort to
 4 arrive at a clinical diagnosis. Granted that he is not there to treat him,
 5 he still wants to probe into areas that are very difficult for most people
 6 to talk about and are especially difficult to talk about for people who
 7 have deficits or dysfunction in that area. Because if you suffer from a
 8 mental illness, one thing that is very clear to you in your own mind is
 9 that there are lots of things that go on in your mind that are strange;
 10 that if other people knew about them, they will freak out. They will
 11 consider them scary or appalling. And so it takes a lot of sensitivity
 12 and support to allow someone to talk about those things.

13 Anybody who has clinical experience interviewing folks with
 14 brain damage, or any major psychiatric disorder, knows that one
 15 major feature of brain damage and psychiatric disorder is denial of
 16 symptoms . . . And if you ask them, is there anything the matter with
 17 you? They'll say no, I'm fine. Everything is cool. Everything is
 18 great. Then, it takes a while and probing and encouragement, and
 19 then they'll start revealing some strange things about themselves.

20 So I was impressed with Martell[I]'s interviewing style that was
 21 almost designed to make Mr. Hernandez look healthy and go with the
 22 natural tendency of people with severe mental illness to deny that
 23 there is anything wrong with them or at least to have difficulties
 24 exposing things about them that are scary and socially unacceptable.

25 (Gur Depo. at 430-32.) Dr. Gur also noted many instances where petitioner
 26 indicated a problem that Dr. Martell ignored or failed to appreciate as significant.
 27 (*Id.* at 432-33.) Dr. Gur explained that “[w]henver Mr. Hernandez came up with a
 28 statement that could imply some emotional pain or some insult to him, instead of
 29 encourag[ing] . . . him to go in that direction, [Dr. Martell] would then either skip
 30 to the next question or ask a question that implied he is not really interested in that
 31 stuff or that it's not important. So it almost looked as if [Dr. Martell] reached his
 32 conclusion before he started the interview and discouraged any information that
 33 will counter his conclusion from emerging.” (*Id.* at 434.)

34 Specifically, Dr. Gur testified that the record includes many indicators that
 35 petitioner is neuropsychiatrically impaired, despite Dr. Martell's conclusion that
 36 petitioner had a mild to moderate impairment in verbal learning. (Gur 6/8/04 Decl.
 37 at 4, ¶ 9.) Dr. Gur noted that the petitioner's “environment was replete with child
 38 abuse and neglect, psychological and physical, of the kind that can lead to brain

1 damage, PTSD or dissociative disorders.” (*Id.* at 5, ¶ 9.) Also, the “existence of
2 such disorders is substantiated by poor impulse control and rather rock-bottom
3 scholastic performance starting at first grade, despite IQ scores falling ‘within the
4 normal to superior range,’ as noted by Dr. Martell.” (*Id.*) Dr. Gur explained that
5 petitioner’s head injuries, along with extensive substance abuse starting at an early
6 age, could have disrupted brain development and function. (*Id.* at 5-6, ¶ 10.)

7 Dr. Gur noted that although petitioner reported amnesia about the crime and
8 his early childhood and adolescent years, Dr. Martell failed to conduct further
9 testing related to petitioner’s memory. (*Id.* at 8, ¶ 14.) The administration of the
10 California Verbal Learning Test (“CVLT”) suggested impairment to petitioner’s
11 frontal lobe, relevant to impulse control, but Dr. Martell failed to conduct further
12 testing to determine the effects of head injuries and substance abuse on the same
13 area of the brain. (*Id.* at 8, ¶ 15.) Dr. Martell also relied on petitioner’s denial of
14 any learning disabilities, when his academic performance starting in first grade,
15 belied that assertion, particularly in light of normal IQ scores. (*Id.* at 9, ¶ 16.)
16 Dr. Martell depended on various tests performed by Dr. Prentiss in 1979 to support
17 his conclusion that petitioner did not have brain damage, but the tests on which
18 Dr. Prentiss relied have been outmoded since 1974. Dr. Gur testified that
19 Dr. Martell’s conclusions about brain damage are, therefore, unreliable. (*Id.* at 9,
20 ¶ 17.) Dr. Gur also faulted Dr. Martell for failing to consider evidence that brain
21 maturation is incomplete at age eighteen, and in petitioner’s case, that substance
22 abuse may have delayed this process further. (*Id.* at 9-10, ¶ 17.) Dr. Gur
23 concluded:

24
25 Neuropsychological testing, by itself, cannot show whether a
26 person has bipolar disorder. Neither can neuropsychological testing
27 show the presence or absence of brain trauma. Like a thermometer in
28 general medicine, it is a useful tool but does not provide a diagnosis.
Neuropsychological testing needs to be done in the context of
medical, neuropsychiatric and neuroradiologic assessment and a
complete history of the patient. Dr. Martell refers only in passing to a
history of “significant mental illness in his biological and adoptive

families, lack of parental supervision, extensive drug and alcohol abuse beginning at an early age,” and head trauma, but his findings do not take into account the extensive medical and social history information regarding Mr. Hernandez and his biological and adoptive families contained in the declaration of Drs. Balkan, Lewis and Clausen.

To summarize, although neuropsychological evaluation is a major part of diagnostic workup for any major psychiatric disorder, indeed for any disorder of complex behavior where brain dysfunction needs to be considered, it is not intended to be used as the sole procedure for arriving at a neuropsychiatric diagnosis, or ruling it out. The results of history and tests already available to Dr. Martell simply indicate the likelihood of brain dysfunction, and the interview and tests . . . conducted by him further support this diagnosis. Follow-up testing is indicated and a more focused evaluation, targeting frontal lobe functioning. There is also enough evidence implicating brain dysfunction to suggest the utility of further studies with structural and functional imaging.

(*Id.* at 10-11, ¶¶ 18-19 (citations omitted).)

Dr. Gur also noted that Dr. Martell’s regular work as a testifying expert, rather than a clinician, made him an ineffective expert:

I would be concerned about someone who spends all of their time testifying, especially if they just testify for one side, without having clinical experience with people who come for help. It would distort their ability to understand the effects of brain dysfunction, since they always see through a prism of the medical-legal context. I would have a problem with someone like that. I don’t think it gives them an advantage. I think, in some ways, it makes them less able to understand how the brain impacts behavior in general and when it comes to specific patients.

(Gur Depo at 482-83.)

Dr. Martell holds himself out as an expert in forensic neuropsychology. (Martell Depo. at 259.) Although eligible for at least a decade prior to the deposition, he had not sought board certification⁵ in neuropsychology. (*Id.* at 277.) Dr. Martell testified that he “might” apply for board certification in neuropsychology, depending on “[t]ime and energy,” as certification in

⁵ It is unclear which board the parties mean when discussing board certification. (*See, e.g.*, Martell Depo at 257.) There appear to be many different kinds of boards, some of which are considered vanity boards. Both parties seem to agree, however that board certification has some value. (Martell Depo. at 281.)

1 neuropsychology “would be nice.” (*Id.* at 279, 281.) Dr. Martell did obtain board
 2 certification in forensic psychology in 2002. (*Id.* at 260.) When asked about how
 3 many failed attempts he had made to become board certified in forensic
 4 psychology, Dr. Martell refused to answer, citing the “peer review privilege” and
 5 noting that he threw out all documentation related to his prior failed attempts to
 6 obtain board certification. (*Id.* at 256, 259, 260, 263, 264, 265-68, 269-70, 271,
 7 278-79; 281.) The peer review privilege does not apply to these proceedings. *See*,
 8 *e.g.*, *Agster v. Maricopa County*, 422 F.3d 836, 839 (9th Cir. 2005) (declining to
 9 recognize the peer review privilege in federal court); Fed. R. Evid 1101(3).
 10 Dr. Martell testified that he threw out the documents in 2000 or 2001 because they
 11 were “old” and “irrelevant,” despite being asked to produce them in 1999 when he
 12 was working on another death penalty case. (Martell Depo. at 267-268, 271.)
 13 Accordingly, the Court gives little weight to Dr. Martell’s testimony.⁶

15 ⁶ Two incidents may give additional reason to doubt Dr. Martell’s credibility. While
 16 retained as an expert for the prosecution in the Ted Kaczynski case, Dr. Martell interviewed
 17 Dr. Gur, retained by Kaczynski, by telephone. (*Id.* at 305.) Dr. Martell recorded the
 18 conversation without informing Dr. Gur. (*Id.* at 305-06.) Dr. Park Diet., who was present during
 19 the recorded phone call, told Dr. Martell that he should not be recording the call, but Dr. Martell
 20 persisted. (*Id.* at 328, 336.) Upon learning that the conversation had been recorded, the
 prosecutor asked for a copy of the tape, which Dr. Martell provided. (*Id.* at 338.) Dr. Gur also
 requested a copy of the tape, which Dr. Martell did not provide, though Dr. Martell ultimately
 apologized for what happened. (*Id.* at 339-340, 344.) Dr. Martell described the incident as
 creating a “black mark that would be an obstacle to [his] work in the future” and that he thought
 it was “unfair.” (*Id.* at 375.)

21 Dr. Martell also was retained by the federal government in the capital prosecution of
 22 Everett Spivey in New Mexico. (*Id.* at 346-47.) The prosecution retained Dr. Martell to
 23 examine the defendant. (*Id.* at 347.) The judge ordered Dr. Martell to file his report under seal
 24 and to not discuss his findings or opinions with the prosecution team. (*Id.* at 348.) The defense
 25 filed a motion to remove the prosecutor, contending that the court’s order had been violated. (*Id.*
 26 at 348-49.) In opposing the motion, the prosecutor prepared an affidavit that Dr. Martell
 27 reviewed, edited and signed. (*Id.* at 351.) The affidavit stated that Dr. Martell did not disclose
 28 any statements or information related to his examination of Spivey. (*Id.* at 353.) The court
 denied the defense motion. (*Id.* at 354.) After jury selection began, the U.S. Attorney’s Office
 conducted an internal investigation into Dr. Martell’s declaration. (*Id.* at 359.) Following that
 investigation, the U.S. Attorney wrote to the Department of Justice, stating that Dr. Martell’s
 affidavit was incomplete and that the court’s order was violated. (*Id.* at 370.) The prosecutor
 initiated plea negotiations that resulted in a dismissal of the death penalty against Spivey. (*Id.*
 at 370-71.) Subsequently, Dr. Martell was removed from a number of federal murder prosecution
 cases nationally. (*Id.* at 372.)

What seems to have happened is that one of the prosecutors hosted a dinner party, to
 which she invited the prosecution team and Dr. Martell. At that party, Dr. Martell posed a

1 **e. Psychologist Charles Sanislow**

2 In rebuttal, petitioner offered two additional experts: clinical psychologist
3 Charles Sanislow and neuropsychologist Ruben Gur.

4 Dr. Sanislow is an assistant psychiatry professor at Yale Medical School and
5 a clinical psychologist. (Sanislow Decl. at 1, ¶ 1.) Dr. Sanislow reviewed
6 Dr. Martell's declaration, as well as raw test data and other materials relating to the
7 MMPI-2 administered to petitioner by Dr. Martell. Dr. Sanislow also reviewed Dr.
8 Maloney's 1982 report and the results of the 1981 MMPI given to petitioner.
9 Finally, Dr. Sanislow reviewed Dr. Lewis's 2003 declaration. (*Id.* at 4-5, ¶ 7.)

10 Dr. Sanislow testified that a profile derived from the MMPI or MMPI-2 is a
11 starting point for making a psychiatric diagnosis. (*Id.* at 10, ¶ 19.) The "gold
12 standard" in psychiatric diagnosis is called LEAD, which stands for "information
13 that is collected over a *Longitudinal* period by *Experts* who come to a consensus
14 based on *All Data* available to them." (*Id.* at 10-11, ¶ 20.) A clinician must gather
15 as much information as possible from multiple sources in order to assess the
16 reliability of the information. The more sources from whom a clinician gathers
17 information, the more confident that clinician can be in the final diagnosis. (*Id.* at
18 11, ¶ 20.) Therefore, a clinician should not only interview the patient thoroughly
19 and conduct appropriate psychological testing, but the clinician also should review
20 all available documentation about the individual's background. (*Id.* at 11, ¶ 21.)

21 _____
22 hypothetical, asking whether a comment Spivey made about the prosecutors would be protected
23 by the court's order. The prosecutors advised Dr. Martell that the court's order would not apply.
24 Knowing that the prosecutors were frightened of Spivey and feared for their physical safety,
25 Dr. Martell told them "you don't need to worry about [Spivey]. He feels sorry for you. He
26 thinks you're a tortured soul." (*Id.* at 467.) Spivey made the comments to Dr. Martell after the
27 mental health examination, while the two men waited to be let out of the examination area. (*Id.*
28 at 467-468.) Dr. Martell asked the prosecutors who drafted his declaration if the statements
Spivey made should be put in the declaration but was advised that they fell outside the court's
order. (*Id.* at 465, 479-80.) Dr. Martell testified that Spivey's statements about the prosecutor
"had no relevance to [his] opinions or findings in the matter." (*Id.* at 468.) Dr. Martell believed
that the prosecutors initially denied that Dr. Martell told them about Spivey's statements but
ultimately "scuttled the case and blamed it on" him. (*Id.* at 472.) Before Dr. Martell's
deposition, respondent apparently did not know about this incident. (*Id.* at 368-369.)

1 With respect to the 1981 MMPI results and Dr. Maloney's related report, Dr.
2 Sanislow concluded: "The elevations noted by Dr. Maloney are indicative of
3 confusion, disorientation, extreme stress and distortions of reality, and are
4 consistent with the psychotic or dissociative thinking that can occur in a bipolar
5 person and noted by Dr. Lewis." (*Id.* at 15, ¶ 27.)

6 Dr. Sanislow noted that the 2003 MMPI-2 administered by Dr. Martell
7 revealed an elevation on Scale 4 but was otherwise within normal limits. The
8 results were insufficient alone to rule out bipolar disorder, as the MMPI is less
9 likely to reflect the relevant symptoms if the person is not experiencing a manic or
10 depressed episode at the time of testing or if the subject has been stabilized for a
11 long time prior to testing. Also, when an individual has been institutionalized for
12 an extended period, the structured environment may help contain symptoms so
13 well that the individual would appear asymptomatic. (*Id.* at 15-16, ¶ 28.)
14 Moreover, Dr. Sanislow testified that the different results on the 2003 MMPI-2 as
15 compared with the 1981 MMPI do not rule out the existence of a psychological
16 disorder at the time of the murders. (*Id.* at 16, ¶ 30.) The results from petitioner's
17 1981 MMPI undermine Dr. Martell's conclusion that petitioner was not bipolar or
18 in a dissociative state at the time of the crimes, particularly because Dr. Martell
19 based his conclusion on the results of the MMPI-2 that he administered in 2003.
20 (*Id.* at 17, ¶ 31.) "[T]he presence of elevated Scales 6, 8 and 9 on Mr. Hernandez's
21 1981 MMPI, at a time much closer to the date of the offenses and the stress which
22 preceded the crimes, cannot be ignored or dismissed without comment." (*Id.*)
23 Dr. Sanislow concluded that the 2003 MMPI-2 "is not a reliable instrument for
24 determining whether Mr. Hernandez was bipolar or dissociative at the relevant
25 times some 22 years prior in 1981." (*Id.* at 16, ¶ 30.)

26 Dr. Sanislow also testified that petitioner could have an elevated score on
27 Scale 4 without suffering from antisocial personality disorder. (*Id.* at 17, ¶ 32.)
28 The score could reflect petitioner's incarceration with others convicted of murder

1 or the abuse he suffered as a child. (*Id.* at 17, ¶ 31.) Moreover, “an elevation on
 2 [Scale 4] alone provides no reliable information about the subject’s overall clinical
 3 status or functioning (e.g., whether he or she will act impulsively). Only when the
 4 scale is considered as part of the overall profile, and in the context of convergent
 5 clinical information, can a clinician reliably draw conclusions regarding the
 6 subject’s actual psychological condition.” (*Id.* at 18, ¶ 32.)

7 **f. Neuropsychologist Ruben Gur**

8 Dr. Gur is a clinical and research psychologist with a specialty in
 9 neuropsychological assessment, and the neurobiological basis and neurobehavioral
 10 aspects of schizophrenia. He is a tenured professor at the University of
 11 Pennsylvania and serves as director of the neuropsychology department as well as
 12 the director of the Brain Behavior Laboratory. (Gur 6/8/04 Decl. at 1, ¶ 1.)

13 Dr. Gur reviewed Dr. Martell’s testing data and testimony, the raw data from tests
 14 administered by Dr. Maloney and Joseph Sawaya, the testimony of Drs. Lewis and
 15 Sanislow, the report of Dr. Prentiss, petitioner’s school transcripts, petitioner’s
 16 statement to the police, petitioner’s penalty phase and deposition testimony, the
 17 declarations of various lay witnesses, the trial testimony of Drs. Girsh, Maloney
 18 and Rayyes, the pretrial reports of Drs. Coburn and Davis, the California Supreme
 19 Court opinion on direct appeal, the autopsy records, the pathologist’s trial
 20 testimony and petitioner’s adoption records. (Gur 2/8/05 Decl. at 3, ¶ 8; Gur
 21 6/8/04 Decl. at 3, ¶ 7.) Dr. Gur conducted a neuropsychological assessment of
 22 petitioner in 2004. (Gur 2/8/05 Decl. at 3, ¶ 8.)

23 Dr. Gur testified that petitioner’s test results were “highly abnormal.” In
 24 fact, Dr. Gur hadn’t “seen profiles like that in a long time. When [he] see[s] them,
 25 they’ve always been associated with severe brain damage.” (Gur Depo. at 462.)
 26 Dr. Gur concluded that petitioner suffers from brain damage that includes the left
 27 temporal lobe, the right superior temporal and the dorsal parietal sensorimotor
 28 cortex. (Gur 2/8/05 Decl. at 10, ¶ 18.) Petitioner’s brain damage is “of unclear but

1 most likely congenital etiology, probably reflecting a neurodevelopmental disorder
2 such as schizophrenia or affective illness, complicated by adverse perinatal and
3 postnatal stressors.” (Gur 2/8/05 Decl. at 10, ¶ 18; *see also* Gur Depo. at 268 (“I
4 did think that either schizophrenia or bipolar illness is probably applicable in his
5 case, although there may be other neural-developmental disorders as well that
6 could have been applicable in his case such as attention deficit, hyperactivity
7 disorder, impulse control.”))

8 Dr. Gur explained that damage to the left temporal lobe causes verbal
9 memory impairment, impeding one’s ability to organize and recall information.
10 (Gur 2/8/05 Decl. at 10-11 ¶ 19.) Damage to the temporal limbic and right parietal
11 regions would cause difficulty interpreting emotional information, controlling and
12 modulating one’s emotional response and could lead to misperceptions or
13 distortions of reality by impairing the ability to distinguish emotions. (*Id.* at 10-11,
14 ¶¶ 19-20.) Extreme emotion and stress can exacerbate these impairments. (*Id.* at
15 11, ¶ 20.) Neuropsychological tests available in 1982 and 1983 would have shown
16 these impairments, but counsel did not request a neuropsychological evaluation of
17 petitioner. (*Id.* at 11-12, ¶¶ 21, 22.) The limited neuropsychological testing that
18 Dr. Maloney gave to petitioner was “not intended to be, and was not an adequate
19 substitute for, a comprehensive neuropsychological evaluation under the then-
20 prevailing professional standards.” (*Id.* at 12, ¶ 22; *see also* Gur Depo. at 454 (“I
21 believe any competent clinical neuropsychologist who would go over the test
22 results, even without the use of the behavioral image, would come to very similar
23 conclusions, namely, that there is evidence” of brain damage.)

24 According to Dr. Gur, petitioner’s brain damage has affected his perception
25 of the world and the way he has functioned in relationships. He has an impaired
26 ability to perceive reality accurately. Specifically, petitioner suffers from a
27 profound impairment in his ability to perceive happiness and sadness, instead
28 misperceiving these emotions as anger and fear. This long-held impairment,

1 experienced by petitioner as early as preschool, is more severe when petitioner is
2 experiencing extreme emotion or stress. (Gur 2/8/05 Decl. at 12, ¶ 23.)

3 Dr. Gur testified that petitioner has attempted to cope with his inability to
4 perceive emotions accurately by relying on other cues to interpret feelings.
5 However, petitioner's efforts were unsuccessful due to the mental illness exhibited
6 by petitioner's adoptive parents. His mother suffered from schizophrenia, and his
7 father met the criteria for paranoid delusional disorder. Dr. Gur opined that the
8 "significant cognitive impairments and thought disorder associated with such
9 illnesses necessarily made it all the more difficult for Francis to learn to rely on
10 other cues." (*Id.* at 12-13, ¶ 24.) Petitioner's childhood behavior and the
11 psychological testing conducted by Joseph Sawaya on petitioner at age five support
12 the conclusion that he suffers from damage to the right parietal and left temporal
13 areas of his brain. (*Id.* at 13-14, ¶ 25.)

14 Dr. Gur concluded that petitioner's brain damage is likely organic, meaning
15 that it was caused by a head injury, sustained either in utero, later or both.
16 Evidence exists that petitioner's mother was beaten during her pregnancy,
17 petitioner was delivered with the help of forceps and petitioner was involved in
18 many accidents as a child and adolescent. (*Id.* at 14, ¶ 27.)

19 Dr. Gur opined that petitioner's deficits existed at the time of the crimes, and
20 his brain damage impacted petitioner's conduct during the crimes. Due to his
21 impairments, petitioner could not understand or respond appropriately to his
22 victims' expressions of resistance and fear. Petitioner's "misperception of reality
23 significantly interferes with his ability to make the right judgment, particularly in
24 an emotionally charged situation." (*Id.* at 15, ¶ 29.) Moreover, petitioner's brain
25 damage also may explain his inability to recall the details of the crime when first
26 questioned by the police. Petitioner testified at his deposition that the police spent
27 several hours going over the details of the crime and showing him pictures before
28 they recorded his statement. When petitioner testified at the penalty phase, he

1 repeatedly answered that he could not recall what happened. (*Id.* at 15-16, ¶¶ 30-
2 32.) The clinical data supports the conclusion that petitioner actually cannot recall
3 significant parts of the crime, and not that he is being evasive or feigning
4 forgetfulness. (*Id.* at 16, ¶ 31.)

5 Dr. Gur also testified that petitioner's brain damage indicates that he was in
6 a dissociative state when he committed part or all of the crimes. The combination
7 of left temporal and right parietal lesions can produce dissociation, or a state in
8 which a person can engage in a complex set of behaviors without intent or
9 premeditation. Petitioner's statement to police, his inability to recall the details of
10 the crimes and his persistent inability to explain why he committed the crimes,
11 despite his acknowledgment that he is responsible for the crimes, are all consistent
12 with him having been in a dissociative state. (*Id.* at 17, ¶ 35.)

13 Dr. Gur also created behavioral imaging, or a computerized algorithm
14 designed to identify brain dysfunction by region based on standard
15 neuropsychological batteries, for petitioner. Dr. Gur and several colleagues from
16 various universities have developed a series of neuropsychological tests, as well as
17 an objective method for interpreting the results. Dr. Gur and his colleagues use the
18 test scores, together with a computer program, to create a three-dimensional visual
19 depiction of brain dysfunction and damage. (Gur 6/8/04 Decl. at 6, ¶ 11.) The
20 images that Dr. Gur created for petitioner show dysfunction in various parts of
21 petitioner's brain, including areas associated with verbal learning deficits,
22 difficulties in abstraction, learning disabilities, attention deficit and hyperactivity,
23 affects on memory consolidation and poor impulse control. (*Id.* at 7, ¶ 12.)

24 On cross examination, Dr. Gur testified that, while in existence for fifteen
25 years at the time of his deposition, the behavioral imaging he has created has not
26 been accepted generally by neuropsychologists in everyday clinical practice across
27 the country. (Gur Depo. at 217.) However, it was subjected to the peer review
28 process in "highly respectable refereed journals," and it was "accepted by the

1 leadership.” (*Id.*) The standardized neuropsychological tests Dr. Gur uses are in
 2 the public domain, not proprietary, are used all over the world and have been
 3 administered to thousands of people. (*Id.* at 228.) Dr. Gur has testified about these
 4 objective tests in many states, including Arizona, California, Delaware, Maryland,
 5 Pennsylvania, South Carolina, Tennessee and Virginia. Dr. Gur’s tests are used by
 6 Cornell Medical School, Dartmouth, Duke University, the Mayo Clinic,
 7 Washington University in St. Louis, as well as the Universities of Alabama,
 8 California (San Diego), Indiana, Pennsylvania, Pittsburgh, South Carolina and the
 9 University of Washington in Seattle. (Gur Depo. at 480-81.) The tests have been
 10 translated and are used in various countries, including Germany, Austria, Japan,
 11 Korea, Holland, Israel, Portugal and Brazil. (*Id.* at 481.)

12 **B. Mental Health Claims**

13 **1. Counsel’s failure to investigate and present the defense of** 14 **diminished capacity (Claims 5(B)(1), 5(B)(2), 5(B)(3)(a),** 15 **5(B)(3)(b) & 5(B)(5))**

16 Petitioner claims that trial counsel performed deficiently by failing to realize
 17 that the defense of diminished capacity was available to petitioner and by failing to
 18 investigate and present evidence in support of a diminished capacity defense.
 19 Petitioner also alleges that counsel failed to provide petitioner’s experts with
 20 information about mental culpability, diminished capacity and related facts. To
 21 successfully bring an IAC claim, petitioner must show that counsel performed
 22 deficiently and that this deficient performance prejudiced petitioner. *Strickland v.*
 23 *Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance,
 24 petitioner must show that trial counsel’s representation fell below an objective
 25 standard of reasonableness as measured by prevailing professional norms.
 26 *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). A showing of prejudice requires
 27 petitioner to demonstrate a reasonable probability that “but for counsel’s
 28 unprofessional errors, the result of the proceeding would have been different.”

1 *Strickland* 466 U.S. at 694. “A reasonable probability is a probability sufficient to
2 undermine confidence in the outcome.” *Id.*

3 At the time of petitioner’s trial, the doctrine of diminished capacity existed
4 in California.⁷ *People v. Saille*, 2 Cal. Rptr. 2d 364, 368 (1991) (“[S]omeone who
5 is unable, because of intoxication or mental illness, to comprehend his duty to
6 govern his actions in accord with the duty imposed by law, cannot act with malice
7 aforethought.”) A defendant’s diminished capacity could result from a physical or
8 mental condition. *Saille*, 2 Cal. Rptr. 2d at 367 (discussing *People v. Wells*, 33
9 Cal.2d 330, 351 (1949)). Nevertheless, trial counsel apparently believed that the
10 defense was unavailable at trial, other than for voluntary intoxication. (1 CDD at
11 19-20, 68; 11 CDD at 136.)

12 Counsel was deficient for failing to realize that a diminished capacity
13 defense was available to petitioner at trial. *See, e.g., Morris v. California*, 966
14 F.2d 448, 454-55 (9th Cir. 1992) (holding that failure to investigate and discover a
15 defense to the crime fell far below any objective standard of reasonableness). In
16 order to obtain relief, however, petitioner must show that counsel’s failure to
17 investigate and present a diminished capacity defense also was deficient and that
18 this deficiency prejudiced petitioner.

19 Petitioner has established deficiency. It is true that Dr. Prentiss, along with
20 Drs. Coburn and Davis, concluded that petitioner had the capacity to commit the
21

22 ⁷ The California legislature enacted California Penal Code Sections 28 and 29 in September
23 1981. Section 28 excludes evidence of “mental disease, defect or mental disorder” in order “to
24 show or negate the capacity to form any mental state, including, but not limited to, purpose,
25 intent, knowledge, premeditation, deliberation or malice aforethought.” Cal. Penal Code § 28.
26 Such evidence is “admissible solely on the issue of whether or not the accused actually formed a
27 required specific intent . . .” *Id.* Section 29 excludes expert witness testimony “as to whether
28 the defendant had or did not have the required mental states.” Cal. Penal Code § 29. In June of
1982, the electorate abolished the diminished capacity defense by initiative. Cal. Penal Code §
25(a) (“In a criminal action . . . evidence concerning an accused person’s intoxication, trauma,
mental illness, disease, or defect shall not be admissible to show or negate capacity to form the
particular purpose, intent, motive, malice aforethought, knowledge, or other mental state
required for the commission of the crime charged.”) Because these changes to the law took
place after petitioner’s crime, the diminished capacity defense was still available to petitioner at
his trial, which began in March 1983. Cal. Penal Code § 3.

1 crimes charged and that he suffered from antisocial personality disorder.
2 Dr. Rayyes provided testimony that supported a diminished capacity defense due
3 to voluntary intoxication, but he also testified that even an impaired alcoholic
4 could form the specific intent to commit all of the charged crimes. Dr. Rabson
5 concluded that the condition of both victims' bodies was inconsistent with
6 consensual sex. In addition, Dr. Girsh diagnosed petitioner with borderline
7 personality disorder and testified at the penalty phase that petitioner could suffer
8 from antisocial personality disorder.

9 However, Dr. Maloney told trial counsel that petitioner was "OK now but
10 had been psychotic." (9 CDD at P00738 (Exh. L-5).) Dr. Maloney concluded that
11 "the data . . . suggest [that petitioner suffered from] some potentially serious
12 psychological problems." (JTD P00829.) Petitioner's profile was highly
13 pathological and indicated a fair amount of hostility. (JTD at P00829.) Counsel
14 did not put Dr. Maloney on the stand during the guilt phase. At penalty,
15 Dr. Maloney testified that he "had no data to suggest that [petitioner] would not be
16 responsible for his behavior" and that petitioner "should have had the capacity to
17 understand what he was doing." (14 RT 3473.) In coming to these conclusions,
18 however, Dr. Maloney did not review various materials gathered since trial but
19 that were reasonably available to counsel before trial. These documents include
20 records and background information regarding petitioner's birth family as well as
21 social history information from petitioner's adopted family, preschool teacher and
22 others.

23 Moreover, Dr. Girsh told trial counsel before trial that there was some
24 indication of an organic, neurological basis for petitioner's behavior. (9 CDD at
25 P00427 (Exh. L-7). In addition, various records from petitioner's childhood
26 showed that petitioner displayed behavior at preschool that might indicate
27 neurological or psychiatric problems, that petitioner was described as troubled and
28 hyperactive as a child, that he was referred for a neurological examination and that

1 he performed poorly on psychological tests.

2 Despite the many clues that petitioner may have been suffering from a
3 neurological problem since childhood, counsel did not request a neurological
4 examination of petitioner, nor did he pursue a diminished capacity defense based
5 on petitioner's psychological problems. Counsel repeatedly testified that his
6 failure to realize that the defense was available or to pursue it based on petitioner's
7 psychological impairments was not tactical or strategic. (1 CDD 22, 33-34,37-39;
8 9 CDD 49-50.) Moreover, trial counsel failed to follow-up with Drs. Coburn and
9 Davis. Neither Dr. Coburn nor Dr. Davis reviewed records related to the
10 Hernandez family's failed attempt to adopt a second child, which included an
11 evaluation of petitioner by a family counselor at age five.

12 Trial counsel performed deficiently. Trial counsel failed to realize that the
13 defense of diminished capacity due to mental defect or condition was available to
14 petitioner. Trial counsel failed to investigate evidence that would have supported a
15 diminished capacity defense. He failed to arrange for a neurological examination
16 of petitioner, despite many red flags suggesting that petitioner suffered from a
17 psychological deficit or condition from early childhood. Trial counsel also failed
18 to follow-up with various psychological experts, both with respect to pursuing a
19 potential guilt phase defense based on petitioner's mental condition and also in
20 terms of providing them with pertinent social history information and records.
21 "The relevant question is not whether counsel's choices were strategic, but
22 whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000).
23 Counsel's failure to realize the defense existed and to investigate it was
24 unreasonable.

25 Although petitioner has established deficiency, he has failed to show
26 prejudice. Petitioner must show that had counsel investigated and presented a
27 diminished capacity defense, the jury likely would have found that petitioner
28 lacked the intent to commit capital murder or rape. This probability must be

1 sufficient to undermine confidence in the jury's guilty verdict. Even if trial
2 counsel had presented expert and documentary evidence suggesting that petitioner
3 did not have the capacity to act with malice aforethought or the specific intent to
4 rape, other circumstances would have undermined a diminished capacity defense.
5 Petitioner's confession recounted many details of the crime. Confronted with the
6 level of detail in petitioner's confession, the jury reasonably could have rejected a
7 defense that petitioner lacked the capacity to form the requisite intent due to
8 intoxication or mental defect. In addition, the victims suffered very similar
9 injuries, and their deaths took place just days apart. These facts could have
10 convinced the jury that some amount of preparation or deliberation was involved
11 in the crimes, undercutting an argument that diminished capacity prevented
12 petitioner from planning, deliberating or harboring malice aforethought. Finally,
13 the majority of California voters elected to abolish the defense of diminished
14 capacity due to mental disease, defect or mental disorder about eighteen months
15 prior to petitioner's trial. *See* Cal. Penal Code § 28. While the change in the law
16 did not affect petitioner's trial because he committed the crimes before the
17 referendum passed, the existence of the initiative may lend some context to
18 petitioner's trial. It could be that a jury would be less likely to accept a defense of
19 diminished capacity due to mental disease, defect or disorder, given the change in
20 the law. While petitioner has raised some doubt about whether the jury would
21 have come to a different verdict at the guilt phase, that doubt is not sufficient to
22 undermine confidence in the jury's guilty verdict. It is not reasonably probable
23 that the jury would have voted differently upon hearing mental health evidence in
24 support of a diminished capacity defense at the guilt phase.

25 Accordingly, the Court DENIES Claims 5(B)(1), 5(B)(2), 5(B)(3)(a),
26 5(B)(3)(b) and 5(B)(5), but will consider counsel's deficiency in the cumulative
27 error analysis.
28

1 **2. Counsel's failure to gather and present appropriate**
 2 **evidence of petitioner's problems with alcohol and drugs**
 3 **(Claims 5(B)(3)(d), 5(B)(4), 5(C)(5), 5(C)(6), 5(C)(8))**

4 In Claims 5(B)(4) and 5(C)(6), petitioner contends that trial counsel failed
 5 at both the guilt and penalty phases to arrange for an appropriate test of
 6 petitioner's reaction to the combined effect of alcohol and drugs. In Claims
 7 5(B)(3)(d) and 5(C)(5), petitioner alleges that trial counsel failed at both the guilt
 8 and penalty phases to properly use significant evidence of petitioner's drug and
 9 alcohol abuse problems. Finally, in Claim 5(C)(8), petitioner asserts that trial
 10 counsel failed to call medical expert Dr. Amer Rayyes to testify during the penalty
 11 phase. Dr. Rayyes could have offered testimony about the combined effect of
 12 drugs and alcohol on petitioner's neurological and mental functioning. Petitioner
 13 further contends that trial counsel failed to consult a toxicologist to develop
 14 additional evidence regarding the impact of drugs and alcohol on petitioner's
 15 mental and physical condition on the night of the crimes.

16 Again, to prevail on a claim of IAC, petitioner must show deficiency and
 17 prejudice. *Strickland*, 466 U.S. at 687.

18 Torelli arranged for an electroencephalogram, or EEG, which examines the
 19 electrical activity of the brain. The EEG given to petitioner was intended to
 20 measure his response to alcohol, and the result was normal. Petitioner contends
 21 that the EEG arranged by Torelli was improperly performed because the
 22 examination concluded before the alcohol took effect and because it did not
 23 measure petitioner's response to drugs. Petitioner argues that trial counsel should
 24 have arranged for a second EEG to be administered but that counsel failed to do so
 25 because he became ill with cancer. In petitioner's view, a properly administered
 26 EEG would have shown evidence of neurological impairment, which would have
 27 been useful at both the guilt and penalty phases.

28 Petitioner cannot show deficiency. Petitioner alleges that the EEG was

1 improperly administered to him, but he has not pointed to facts in support of this
2 claim. Moreover, petitioner has failed to cite record facts that should have put
3 counsel on notice that the EEG was administered incorrectly. The record, together
4 with the evidentiary hearing evidence, fail to support petitioner's conclusory and
5 speculative claim of deficiency. *Jones v. Gomez*, 66 F.3d 199, 204-05 (9th Cir.
6 1995) (holding that "conclusory allegations which are not supported by a
7 statement of specific facts do not warrant habeas relief") (internal quotation marks
8 and citation omitted); *cf. Blackledge v. Allison*, 431 U.S. 63, 75 n.7 (1977) ("[T]he
9 petition is expected to state facts that point to a real possibility of constitutional
10 error.") (internal quotation marks and citation omitted).

11 Petitioner also cannot show prejudice. Petitioner's allegation that a second
12 EEG—with a longer gap in time between the administration of alcohol and the
13 examination—would have revealed neurological or other brain damage is pure
14 conjecture. Petitioner's "claim of prejudice amounts to mere speculation." *Cooks*
15 *v. Spalding*, 660 F.2d 738, 740 (9th Cir. 1981).

16 Relatedly, petitioner asserts that trial counsel failed at both the guilt and
17 penalty phases to present significant evidence of petitioner's drug and alcohol
18 abuse. In particular, petitioner contends that trial counsel failed to present
19 evidence that alcohol and drugs exacerbated petitioner's neurological
20 abnormalities, including at the time of the crimes, either through the testimony of
21 Dr. Rayyes or another expert. Petitioner also argues that counsel failed to consult
22 a toxicologist to develop additional evidence about the impact of drugs and alcohol
23 on petitioner's mental and physical condition. (Pet. at 36, 40.)

24 Counsel presented the theory petitioner suggests. In his opening statement
25 at guilt, trial counsel stated that "Francis Hernandez is essentially a Dr. Jekyll[1]
26 and Mr. Hyde when it comes to the use and abuse of alcohol and drugs" and that
27 "when he utilizes [drugs or alcohol], the fact of the matter is he would essentially
28 go crazy, particularly with reference to the use of alcohol." (12 RT 2999.)

1 Counsel outlined that the defense would rely in large part on petitioner's
2 inebriation at the time of the crimes and Dr. Rayyes's opinion that petitioner
3 suffered from alcoholism. (12 RT 3000, 3002.) Dr. Rayyes did in fact testify that
4 petitioner suffered from alcoholism and that he was impaired to such a degree on
5 the night of the crimes that he could not form the specific intent to commit murder.
6 (12 RT 3061-70.) Counsel argued at the close of the guilt phase that petitioner
7 lacked the specific intent to commit the murders. (12 RT 3167-74.) Counsel also
8 argued at the penalty phase that alcoholism prevented petitioner from
9 remembering the details of the crime. (14 RT 3659.)

10 Petitioner argues that counsel did not tie petitioner's problems with
11 substance abuse to petitioner's mental condition, particularly by showing that
12 alcohol and drugs exacerbated petitioner's neurological deficiencies. Petitioner
13 also faults counsel for not consulting a toxicologist to explain the physiological
14 impact of alcohol and drugs on petitioner. Petitioner fails to demonstrate deficient
15 performance. Trial counsel relied on an EEG ordered by prior counsel and
16 administered by a professional, without any objective indication that the test was
17 administered improperly. Trial counsel also consulted with an expert on
18 alcoholism, and that expert testified that petitioner suffered from alcoholism and
19 explained the effects that alcohol would have had on petitioner's conduct.
20 Counsel's performance was not deficient. "*Strickland* does not guarantee perfect
21 representation, only a 'reasonably competent attorney.'" *Harrington v. Richter*,
22 131 S.Ct. 770, 791 (2011) (quoting *Strickland*, 477 U.S. at 687); *see also U.S. v.*
23 *Burroughs*, 613 F.3d 233, 246-47 (D.C. Cir. 2010) ("The Sixth Amendment . . .
24 does not pledge perfection.") (quoting *United States v. Hurt*, 527 F.3d 1347, 1357
25 (D.C. Cir. 2008).) Petitioner suggests, without demonstrating, that counsel could
26 have used an additional expert or put Dr. Rayyes on at the penalty phase to
27 connect petitioner's substance abuse problems to his neurological deficits. While
28 more specific or nuanced expert testimony about alcohol and drugs could have

1 been desirable, it is not constitutionally required. “The Sixth Amendment
2 guarantees reasonable competence, not perfect advocacy judged with the benefit of
3 hindsight.” *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003); *cf. Richter*, 131 S.Ct. at
4 791 (“Just as there is no expectation that competent counsel will be a flawless
5 strategist or tactician, an attorney may not be faulted for a reasonable
6 miscalculation or lack of foresight for failing to prepare for what appear to be
7 remote possibilities.”) Petitioner’s claims of deficiency and prejudice fail.

8 Accordingly, the Court DENIES Claims 5(B)(3)(d), 5(B)(4), 5(C)(5),
9 5(C)(6) and 5(C)(8).

10 **3. Counsel’s failure to investigate petitioner’s biological**
11 **family (Claims 5(B)(6) & 5(C)(10))**

12 In Claims 5(B)(6) & 5(C)(10), petitioner argues that trial counsel failed to
13 investigate the identity and psychological background of petitioner’s biological
14 parents, even though counsel knew petitioner was adopted. Petitioner alleges that
15 if trial counsel had conducted an investigation, he would have discovered: (1) that
16 petitioner’s biological parents had a long history of serious psychiatric
17 impairments, (2) that the psychiatric problems petitioner’s biological parents
18 suffered from had a genetic component and, therefore, resulted in petitioner having
19 a predisposition to severe adaptation and psychological problems, (3) that
20 petitioner’s biological father has been psychiatrically institutionalized and
21 evaluated as a schizophrenic; (4) that petitioner’s biological mother also had been
22 institutionalized; (5) that some of petitioner’s biological maternal siblings suffered
23 from serious psychiatric and emotional difficulties requiring at least one of them to
24 be hospitalized for mental health disorders; and (6) that petitioner’s biological
25 mother abused alcohol while pregnant with petitioner, was a victim of abuse
26 during her pregnancy with petitioner and that forceps were used in petitioner’s
27 delivery. Petitioner contends that the presentation of this evidence would have
28 supported a theory that his severe psychological disorders prevented him from

1 forming the specific intent necessary to support a first degree murder conviction or
2 would have provided significant mitigating evidence.

3 Petitioner must demonstrate deficiency and prejudice to obtain relief on a
4 claim of IAC. *Strickland*, 466 U.S. at 687.

5 Counsel performed deficiently by failing to investigate petitioner's birth
6 family. Trial counsel knew that petitioner was adopted and, believing that mental
7 illness had a genetic component, counsel intended to investigate petitioner's birth
8 family. (10 CDD 52.) Torelli's file, which he handed over to trial counsel,
9 included the name of petitioner's birth mother. (9 CDD 52, 10 CDD 50-51, 11
10 CDD 86.) Trial counsel sought a court order authorizing him to access all records
11 regarding the Hernandez family's attempt to adopt a second child. (1 CT 279-84.)
12 The trial court granted petitioner's request. In fact, the trial court authorized
13 petitioner to access the adoption records regarding the failed adoption, including
14 all adoption records related to the Hernandez family for an eight-year period. (1
15 CT 285-86) (authorizing access to adoption records for the Hernandez family from
16 1962, the year of petitioner's birth and adoption, through and including 1970).
17 Moreover, the judge who granted petitioner access to adoption records concerning
18 the Hernandez family testified in these proceedings that petitioner's capital
19 prosecution would have been good cause to open the adoption records and that she
20 would have authorized access to information identifying petitioner's birth parents.
21 (Pokras Decl. at 1, ¶2.) Trial counsel never attempted to obtain petitioner's
22 adoption records. He testified that he had no tactical reason for this decision. (9
23 CDD 52, 10 CDD 50-51, 11 CDD 86.) No reasonable basis supports counsel's
24 failure to acquire petitioner's adoption records. Trial counsel performed
25 deficiently. *Silva v. Woodford*, 279 F.3d 825, 842 (9th Cir. 2002) ("[A]n
26 attorney's failure to investigate, during either the guilt phase or the sentencing
27 phase of a capital trial, can amount to constitutionally deficient performance.")

28 Moreover, trial counsel failed to conduct any investigation into petitioner's

1 birth family, despite all experts agreeing that such evidence would have been
2 germane to petitioner's defense at trial. A letter from the Los Angeles Department
3 of Children's Services to counsel on direct appeal shows the following:
4 petitioner's birth mother was an unmarried 14-year-old; the birth father was an 18-
5 year-old unemployed man who was incarcerated for robbery after being sentenced
6 to a five-year term in 1961; the relationship continued in defiance of the wishes
7 expressed by the birth mother's family; the birth mother deliberately disobeyed her
8 parents; the birth parents frequented "drinking parties" and had a violent
9 relationship, "as the birth father beat [the birth mother] on numerous occasions and
10 appeared to enjoy the brutal treatment"; and the birth father told the birth mother
11 to take quinine tablets to terminate the pregnancy. (4/27/05 Joint Stipulation
12 Exh. C.) The records also show that forceps were used in petitioner's birth. (*Id.*)
13 In investigating petitioner's birth family, appellate counsel learned that petitioner's
14 birth mother and members of her family suffer from depression and other mental
15 disorders and that petitioner's birth father suffers from substance abuse and
16 schizophrenia. Trial counsel's failure to investigate petitioner's birth family was
17 deficient. *See Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1998) (noting that
18 a complete mental evaluation must contain information about a petitioner's
19 personal background); *see also* Lewis 8/15/03 Decl. at 4, ¶ 8 ("It is impossible to
20 understand Francis Hernandez's psychiatric condition . . . without a clear
21 understanding of the interactions among his genetic vulnerabilities to severe
22 mental illness which he inherited from his biological mother and father, the effects
23 of in utero exposure to alcohol and drugs, repeated head injuries beginning in early
24 childhood, and an upbringing in a psychotic, physically and sexually abusive, and
25 severely neglectful adoptive family.") "Thus, [the Ninth Circuit has] found
26 counsel ineffective where he neither conducted a reasonable investigation nor
27 made a showing of strategic reasons for failing to do so." *Sanders v. Ratelle*, 21
28 F.3d 1446, 1456 (9th Cir. 1994).

1 **a. Guilt phase prejudice**

2 Petitioner has not shown that the failure to investigate his birth family
3 caused him unconstitutional prejudice at the guilt phase.

4 Petitioner argues that the evidence related to his birth family would have
5 enabled him to assert a successful diminished capacity defense. Specifically,
6 petitioner contends that with information about his birth family, he could have
7 shown that he was in a dissociative state during the crimes. (Ptr's Corrected Brief
8 on Prejudice at 106.) Evidence that petitioner inherited a vulnerability to mental
9 illness also would have supported the argument that petitioner did not and could
10 not premeditate or deliberate the killings with the requisite specific intents. (*Id.* at
11 107.) As discussed with respect to guilt phase claims concerning counsel's failure
12 to pursue a diminished capacity defense, this defense likely would have failed.
13 Even bolstered in part by evidence of mental illness in petitioner's birth family, as
14 well as the poor circumstances of petitioner's in utero development and birth, a
15 diminished capacity defense due to petitioner's mental condition likely would have
16 gained little traction at trial. Petitioner's detailed confession would have undercut
17 evidence that petitioner dissociated during both crimes. Moreover, the crimes
18 were incredibly similar and took place close in time. A reasonable jury could have
19 concluded that petitioner did in fact deliberate and premeditate the crimes. Also as
20 discussed *supra*, California voters had passed a referendum that eliminated the
21 defense of diminished capacity due to mental disease, defect or mental disorder a
22 year and a half before petitioner's trial. *See* Cal. Penal Code § 28. Though the
23 defense technically applied to petitioner's case, the general culture at the time may
24 have been hostile to accepting this sort of defense at the guilt phase. The
25 additional evidence about petitioner's biological family does not support a
26 conclusion that the jury would have voted differently at the guilt phase.

27 Accordingly, the Court DENIES Claim 5(B)(6) but will consider counsel's
28 deficient performance in the cumulative error analysis.

1 **b. Penalty phase prejudice**

2 The prejudice analysis requires the Court to “evaluate the totality of the
3 available mitigation evidence—both that adduced at trial, and the evidence
4 adduced at the habeas proceeding—in reweighing it against the evidence in
5 aggravation.” *Williams (Terry) v. Taylor*, 529 U.S. 362, 398 (2000).

6 The prosecution’s penalty phase case in aggravation relied solely on the
7 circumstances of the crime. Petitioner presented the brief testimony of several
8 family members, a friend, petitioner’s ex-girlfriend and two clinical psychologists
9 in mitigation. Petitioner also took the stand. The penalty phase lacked a coherent
10 narrative, but some themes included that petitioner abused alcohol; that his mother
11 had suffered several mental breakdowns during his childhood; that petitioner had
12 some emotional problems; that petitioner would probably not be dangerous in
13 prison and that petitioner’s life should be saved due to familial love, his potential
14 for religious salvation or both.

15 Dr. Girsh testified that petitioner likely suffered from borderline personality
16 disorder and, on cross-examination, that petitioner may have suffered from
17 antisocial personality disorder. (14 RT 3584, 3599.) Dr. Maloney testified that
18 petitioner suffered from “emotional disturbances” from an early age, but that
19 Dr. Maloney had no data to suggest that petitioner was psychotic, disturbed or
20 unable to understand what he was doing at the time of the crimes. (14 RT 3473-
21 74, 3475.) Neither Dr. Girsh nor Dr. Maloney knew the circumstances of
22 petitioner’s in utero development or his inherited predisposition to mental illness.

23 The brief testimony from petitioner’s family members did not evoke much
24 mercy. Petitioner’s adoptive mother provided largely scattered testimony about
25 her mental illness, with no testimony about how her incapacitation affected
26 petitioner. Petitioner’s adoptive father testified that petitioner was upset about his
27 mother’s breakdowns but that he tried to be helpful, that petitioner was harassed a
28 lot by the police due to his race, that petitioner was able to take care of himself

1 starting around age seven or eight and that petitioner got angry when he did not get
2 his way. Petitioner's uncle testified that petitioner had too much responsibility
3 heaped on him, that he did not have a backyard with grass growing up and that had
4 a bad experience at Montessori preschool. Petitioner's paternal aunt testified that
5 she saw petitioner only two or three times a year since his adoption, but that she
6 would commit to writing petitioner every month and visiting him every other
7 month if he were sentenced to life without parole. A friend testified that petitioner
8 convinced her to give up drinking and smoking because she had Diabetes.
9 Petitioner's ex-girlfriend testified that they had normal sex and only one violent
10 episode, when petitioner slapped her after she hit him with a pipe.

11 "It is imperative that all relevant mitigating information be unearthed for
12 consideration at the capital sentencing phase." *Caro v. Calderon*, 165 F.3d 1223,
13 1227. Moreover, "[t]he Constitution prohibits imposition of the death penalty
14 without adequate consideration of factors which might evoke mercy." *Hendricks*
15 *v. Calderon*, 70 F.3d 1032, 1044 (9th Cir. 1995) (internal quotation marks and
16 citation omitted). Petitioner's adoption and birth records would have shown that
17 petitioner was born to a fourteen-year-old girl in a physically abusive relationship
18 with an incarcerated eighteen-year-old. Petitioner was exposed to violence, drugs
19 and alcohol in utero. Petitioner was delivered with forceps, which are known to
20 cause neurological damage. (*See* Gur 2/8/05 Decl. at 14, ¶ 27.) Limited additional
21 investigation into petitioner's birth family would have shown that petitioner's birth
22 mother suffered from depression and that his father suffered from serious mental
23 illness. Petitioner's mental health experts did not know about the circumstances of
24 petitioner's birth family or in utero development, and the jury did not hear any
25 such evidence. Had petitioner's experts considered and testified about petitioner's
26 inherited vulnerability to mental illness, his exposure to toxins in utero and his
27 forceps delivery, a substantially different case in mitigation would have been
28 presented. The question is whether it is reasonably probable that the jury would

1 have reached a verdict of life without parole.

2 The Ninth Circuit has held “that overwhelming evidence of guilt does not
3 ameliorate the failure to present mitigating evidence at the penalty phase.” *Caro*,
4 165 F.3d at 1277. In fact, “the determination of whether to impose a death
5 sentence is not an ordinary legal determination which turns on the establishment of
6 hard facts. The statutory factors [in California] give the jury broad latitude to
7 consider amorphous human factors, to weigh the worth of one’s life against his
8 culpability.” *Id.* (quotation marks and citations omitted). Petitioner’s brain
9 damage was rooted in part in his biological background: being born to fourteen-
10 year-old girl who abuses alcohol during pregnancy and a forceps delivery. (Gur
11 Depo. at 461.) Counsel’s failure to investigate and present evidence concerning
12 petitioner’s biological roots certainly caused him prejudice. Evidence about
13 petitioner’s biological background, prenatal circumstances and birth certainly
14 would have made a marked improvement to the weak mitigation case presented.
15 Weighed against the aggravating circumstances of the crime, and considering the
16 damaging effect of petitioner’s penalty phase testimony, however, petitioner has
17 not shown prejudice sufficient to undermine confidence in the jury’s verdict.

18 Accordingly, the Court DENIES Claim 5(C)(10) but will consider this claim
19 in the cumulative error analysis.

20 **4. Counsel’s failure to investigate and present evidence of**
21 **petitioner’s dysfunctional adoptive family (Claims**
22 **5(B)(3)(c) & 5(C)(3))**

23 In Claim 5(C)(3), petitioner claims that trial counsel failed at the guilt and
24 penalty phases to properly use evidence regarding the unstable and dysfunctional
25 nature of petitioner’s family background.

26 To prevail on a claim of IAC, petitioner must show deficiency and
27 prejudice. *Strickland*, 466 U.S. at 687.

28 Trial counsel knew that petitioner had been abused. (1 CDD 13.) Counsel

1 did not attempt to obtain petitioner's childhood medical records, to interview the
2 family's doctor or to investigate allegations of abuse. Moreover, counsel did not
3 attempt to obtain the medical or psychiatric records for petitioner's adoptive
4 mother, Naomi, who was diagnosed with schizophrenia when petitioner was six.
5 Counsel did not contact Naomi's treating psychiatrists. Counsel did not interview
6 family members about Naomi's behavior before, during and after her breakdowns.
7 Counsel did not attempt to locate or interview the person hired to help in the
8 Hernandez home after Naomi's first breakdown. Trial counsel testified that he did
9 not have a tactical reason for failing to conduct this investigation. (1 CDD 13, 31-
10 32, 55-56.) Counsel never learned that petitioner's mother used to sit on him to
11 calm him down, that she and petitioner would tie each other up or to a chair as a
12 form of play and that she forcibly administered enemas to petitioner as discipline,
13 making him hold the fluid inside for ten to fifteen minutes. (7/16/03 Kuhl Decl. at
14 6-7, ¶ 24; 7, ¶¶ 26, 29.)

15 At trial, Naomi testified that she had several breakdowns, that she was in
16 and out of mental hospitals and that she was depressed. No one testified about
17 Naomi's behavior at the time or about how it affected petitioner. As part of the
18 evidentiary hearing, Naomi testified. She suffered hallucinations and was
19 hospitalized for several times for many months. (7/16/03 Decl. at 9, ¶ 36.) During
20 her time in the hospital, she "didn't know who was taking care of Francis" and
21 "just wasn't able to think about that." (*Id.* at 9, ¶ 37.) She remembers Francis
22 coming to visit and that he "didn't look like he was being taken care of very well.
23 He looked disheveled." (*Id.*) When she was released, she took Mellaril, a fact the
24 jury did hear. However, no one explained the medication's effects at trial. Naomi
25 felt "so lethargic" that it was like she "was in slow motion all the time." Her
26 "breakdowns also affected Francis badly. I did so many odd things that it must
27 have confused Francis when he was a little boy. My medication also made me
28 unable to be a mother to Francis. I was just too slow and depressed to do the

1 things a mother should do for her son. I feel very sad about that. My mental
2 illness made me so depressed and miserable that I think our home was a bad place
3 for a little boy.” (*Id.* at 17-18, ¶ 73.)

4 Counsel also did not investigate and present evidence that when Naomi
5 suffered her second breakdown and was hospitalized, petitioner’s adoptive father
6 got a job working in Palmdale. Because his father commuted from Long Beach,
7 petitioner was often on his own starting at age eight. (*Id.* at 11-12, ¶ 47.)

8 “Counsel has a duty to make reasonable investigations or to make a
9 reasonable decision that makes particular investigations unnecessary.” *Strickland*,
10 466 U.S. at 691. The scope of counsel’s investigation was inadequate and
11 unreasonable, given the various leads evident in the information counsel did know.
12 *Wiggins*, 539 U.S. at 525 (“[A]ny reasonably competent attorney would have
13 realized that pursuing these leads was necessary to making an informed choice
14 among possible defenses, particularly given the apparent absence of any
15 aggravating factors in petitioner’s background.”) “[T]he investigation should
16 include inquiries into social background and evidence of family abuse.”
17 *Summerlin v. Schriro*, 427 F.3d 623, 630 (9th Cir. 2005) (en banc). Moreover, the
18 record reflects that “counsel uncovered no evidence in [his] investigation to
19 suggest that a mitigation case, in its own right, would have been
20 counterproductive, or that further investigation would have been fruitless”
21 *Wiggins*, 539 U.S. at 525.

22 “[T]he duty to investigate does not force defense lawyers to scour the globe
23 on the off chance something will turn up; reasonably diligent counsel may draw a
24 line when they have good reason to think further investigation will be a waste.”
25 *Rompilla v. Beard*, 545 U.S. 374, 383 (2005) (quoting *Wiggins*, 539 U.S. at 525).
26 In this instance, however, effective representation would not have required counsel
27 to do anything as dramatic as scour the globe in the hope that he would find
28 something helpful. Instead, the record shows that counsel’s failure to investigate

1 and present evidence about petitioner's unstable and dysfunctional upbringing was
2 objectively unreasonable, given what counsel knew at the time.

3 In addition, "[c]ounsel have an obligation to conduct an investigation which
4 will allow a determination of what sort of experts to consult. Once that
5 determination has been made, counsel must present those experts with information
6 relevant to the conclusion of the expert." *Caro v. Calderon*, 165 F.3d 1223, 1226-
7 27 (9th Cir. 1998). Counsel did not realize the importance of having an expert
8 explain how petitioner would have been impacted by his adoptive mother's
9 schizophrenia. Moreover, counsel failed to provide the clinical experts who
10 testified at the penalty phase with a full picture of the family's difficulties, as
11 counsel inadequately investigated petitioner's home life. Counsel's failure to
12 conduct an adequate investigation was deficient.

13 **a. Guilt phase prejudice**

14 As with the other guilt phase claims discussed, petitioner has not shown that
15 counsel's failure to investigate and present the dysfunctional nature of his adopted
16 family caused him unconstitutional prejudice at the guilt phase.

17 Again, petitioner argues that his adoptive mother's psychotic behavior and
18 the physical abuse that both parents inflicted on him interfered with petitioner's
19 ability to premeditate, deliberate and harbor the specific intent to kill. (Ptr's Brief
20 on Deficiency at 20-21.) As discussed, a diminished capacity defense due to
21 petitioner's mental condition—whether bolstered by his adoptive mother's
22 psychosis, the abuse petitioner suffered at his adoptive parents' hands or
23 both—was not likely to succeed at the guilt phase. The detail contained in
24 petitioner's confession and the nearly identical nature of the crimes could cause a
25 reasonable jury to reject a claim that petitioner could not deliberate or premeditate
26 or that he dissociated during the crimes. Also as discussed, about eighteen months
27 before trial, an initiative had passed in California that abolished the defense of
28 diminished capacity due to mental disease, defect or mental disorder. *See Cal.*

1 Penal Code § 28. This context may have undercut the potential efficacy of a
2 diminished capacity defense at the guilt phase.

3 Accordingly, the Court DENIES Claim 5(B)(3)(c) but will consider
4 counsel's deficiencies in the cumulative error analysis.

5 **b. Penalty phase prejudice**

6 Again, the Court must weigh the evidence in mitigation, including the
7 evidence adduced at trial together with the evidence presented at the evidentiary
8 hearing, against the evidence in aggravation. *Williams (Terry)*, 529 U.S. at 398.
9 As discussed, the aggravating evidence in this case is limited to the circumstances
10 of the crime.

11 The jury heard petitioner's adoptive parents, Naomi and Frank, testify about
12 Naomi's nervous breakdowns. Their trial testimony makes clear that Naomi was
13 severely depressed and in and out of mental hospitals from when petitioner was
14 age six until he was about fifteen, when Naomi left Frank. However, some of
15 Frank's testimony downplayed the seriousness of Naomi's illness. (*See, e.g.*, 13
16 RT 3371 (testifying that when Naomi had her second breakdown when petitioner
17 was eight that "Francis was older and he seemed to be able to take care of himself
18 a little better in that situation, and I think that my wife showed some
19 improvement" despite subsequent nervous breakdowns requiring lengthy
20 hospitalizations). No one testified about the effect that Naomi's very serious
21 mental illness had on petitioner. Even the clinical psychologists who testified had
22 little to offer. Dr. Girsh testified only that petitioner's upbringing was
23 "amorphous," "haphazard and unstructured." (14 RT 3589.) When asked how
24 petitioner's home life affected petitioner, Dr. Maloney responded: "Well, the
25 mother left the scene not—somewhere during Francis'[s] childhood. So she was
26 not there at all for guidance, and previous to that, was fairly incapable of handling
27 him. The father tended to excuse any problem Francis had. The net effect of all
28 this was [petitioner] never got treated for anything." (14 RT 3478-79.) Counsel

1 did not investigate or present any evidence about how being raised by a psychotic,
2 schizophrenic mother and a paranoid father affected petitioner.

3 Trial counsel's failure to investigate and present the dysfunctional nature of
4 petitioner's adoptive family had dire consequences at the penalty phase. Counsel
5 presented some testimony that petitioner was raised by a mentally ill mother, but
6 "[t]he jury did not . . . have the benefit of expert testimony to explain the
7 ramifications of these experiences on [petitioner's] behavior. Expert evidence is
8 necessary on such issues when lay people are unable to make a reasoned judgment
9 alone." *Caro v. Calderon*, 165 F.3d at 1227. The evidence presented about
10 petitioner's unfortunate home life was limited and without context.

11 Dr. Clausen, who specializes in children and adolescents, offered
12 evidentiary hearing testimony about the impact that petitioner's schizophrenic
13 mother would have had on him. Children raised by a schizophrenic parent tend to
14 suffer from various difficulties, including cognitive, behavioral, emotional and
15 social. (Clausen Decl. at 93-94, ¶ 235.) Naomi's schizophrenia prevented
16 petitioner from forming a healthy attachment to his primary caretaker as an infant,
17 resulting in a failure to develop basic trust. (*Id.* at 94-96, ¶¶ 236-40.) Naomi and
18 Frank's poor parenting also prevented petitioner from developing a sense of
19 autonomy and initiative, the appropriate developmental task for a child ages two to
20 six. Consequently, petitioner lacked a healthy self-concept, as well as basic skills
21 in social comprehension and interpersonal communication. Petitioner had no
22 grasp of the expectations of him or the consequences for failing to meet those
23 expectations. (*Id.* at 96-103, ¶¶ 241-49, 251.) In his early school years, petitioner
24 developed anxiety and depression, and he avoided going home. (*Id.* at 109, ¶ 264.)
25 In fifth grade, petitioner began coping by using drugs and alcohol regularly, and
26 his substance abuse habits grew worse with time. (*Id.* at 109, ¶ 266.) Petitioner
27 had no boundaries or structure and began acting out during his teen years. (*Id.* at
28 110, ¶ 268; 112, ¶ 273; 113 ¶ 274.) Petitioner's mother abandoned the family

1 without saying goodbye when petitioner was fifteen. (*Id.* at 113, ¶ 275.)

2 Petitioner turned more often to drugs, and the physical condition of his home
3 deteriorated further. (*Id.* at 113-14, ¶¶ 276, 277.)

4 Dr. Lewis opined that Naomi's inadequate mothering affected petitioner in
5 significant ways. As early as preschool, petitioner manifested psychotic behavior,
6 such as attacking his peers without provocation, misperceiving reality, misreading
7 social cues, bringing dangerous items to school, engaging in dangerous behavior
8 and being unable to transition from one activity to another. (Lewis 8/15/03 Decl.
9 at 25-27, ¶¶ 63, 67-68.) A psychological evaluation of petitioner at age five
10 showed that he was "frantic" and "very disturbed." (*Id.* at 29, ¶ 73.) The horrid
11 physical condition of petitioner's home added to the problem. Dr. Lewis
12 concluded that "[n]o child raised in such an environment could be expected to
13 develop normally. He or she would have no models for normal social interaction
14 and no experiences of the kind of ongoing nurturing and cognitive stimulation that
15 every human being requires for normal adaptation." (*Id.* at 30, ¶ 76.)

16 Dr. Lewis also testified that a connection existed between the administration
17 of enemas to petitioner as a child and the sodomy aspect of the crimes. (*Id.* at 19,
18 ¶ 46.) Specifically, Dr. Lewis testified that "[c]hildren who have been repeatedly
19 stimulated sexually and/or teased sexually by an adult, especially a mother, are at a
20 very high risk of acting out sexually and aggressively toward women other than
21 their abusers." (*Id.*) In fact, "[r]epeatedly holding a child down and inserting
22 objects into that child's rectum is a form of sodomy The acts are experienced
23 by the child as repeated anal sexual assaults. (Lewis 5/8/04 Decl. at 11, ¶ 30.)
24 Although the Supreme Court has held that a nexus between a petitioner's crime
25 and his or her mental condition is not required, an expert's opinion that petitioner
26 sodomized his victims because of the abuse he suffered as a child would have been
27 powerful mitigating evidence. *See, e.g., Tennard v. Dretke*, 542 U.S. 274, 287
28 (2004).

1 Finally, Dr. Gur testified that petitioner's biological background, coupled
 2 with his adoptive parents' problems, was "a prescription for disaster. It's a
 3 prescription for someone who will really never develop normally and will not have
 4 much of a chance to develop the mental and intellectual and personal capacity to
 5 cope with life's stresses." (Gur Depo. at 447.)

6 "[D]efense counsel's penalty phase performance was constitutionally
 7 deficient where counsel 'failed to adequately investigate, develop, and present
 8 mitigating evidence to the jury even though the issue before the jury was whether
 9 [the defendant] would live or die.'" *Ainsworth v. Woodford*, 268 F.3d 868, 874
 10 (9th Cir. 2001); *see also Caro*, 165 F.3d at 1226-27 (remanding for an evidentiary
 11 hearing where counsel failed to investigate and present "precisely the type" of
 12 mitigating evidence "most likely to affect a jury's evaluation of the punishment"
 13 petitioner should have received). Dr. Lewis testified that "one cannot
 14 overemphasize the effects on Francis, as a psychiatrically vulnerable child to begin
 15 with, of being raised by a chronically psychotic, sexually abusive mother." (Lewis
 16 8/15/03 Decl. at 19, ¶ 46.) Mitigation evidence about how petitioner's
 17 dysfunctional family circumstances affected him would have provided compelling
 18 evidence at the penalty phase. "[E]vidence about the defendant's background and
 19 character is relevant because of the belief, long held by this society, that
 20 defendants who commit criminal acts that are attributable to a disadvantaged
 21 background . . . may be less culpable than defendants who have no such excuse."
 22 *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

23 The excluded evidence about petitioner's home life, including testimony
 24 about the abuse petitioner suffered and the relationship between that abuse and the
 25 crime, would have provided powerful and compelling mitigating evidence. When
 26 weighed against petitioner's damaging penalty phase testimony, however,
 27 petitioner has not demonstrated a reasonable probability of a different penalty
 28 phase verdict. (*See Discussion of Claim 5(D)(27) infra.*)

1 Accordingly, the Court DENIES Claim 5(C)(3) but will consider counsel's
2 deficiencies in the cumulative error analysis.

3 **5. Counsel's failure to present evidence of petitioner's mental**
4 **condition (Claims 5(C)(1), 5(C)(2), 5(C)(4) & 5(C)(9))**

5 In Claims 5(C)(1), petitioner argues that counsel failed to present evidence
6 of petitioner's mental condition that would have been compelling mitigating
7 evidence, including that petitioner suffered from clinically significant
8 manifestations of schizophrenia, hypomania, manic depression, hyperactivity,
9 psychotic deviations and impulse disorders. In Claim 5(C)(2), petitioner contends
10 that trial counsel failed to introduce psychiatric reports describing petitioner's
11 clinical profile as "highly pathological" and "schizo-manic." In Claim 5(C)(4),
12 petitioner asserts that trial counsel failed to introduce documentary evidence that
13 would have corroborated these diagnoses. In Claim 5(C)(9), petitioner argues that
14 trial counsel limited the testimony of petitioner's clinical and forensic psychologist
15 Dr. Faye Girsh at the penalty phase. Counsel also failed to call witnesses who
16 could have offered first-hand accounts of petitioner's lack of dangerousness in
17 custody.

18 A successful claim of IAC requires a showing of both deficiency and
19 prejudice. *Strickland*, 466 U.S. at 687.

20 **a. Deficiency**

21 In advance of trial, Dr. Maloney examined petitioner. Dr. Maloney reported
22 that the "data do suggest some potentially serious psychological problems" and
23 that petitioner had a "highly pathological profile." (JTD at P00829.) Dr. Maloney
24 found that petitioner had significant elevations on scales measuring hypomania,
25 schizophrenia, psychopathic deviate and paranoia. (*Id.*) He explained that people
26 with similar profiles have episodes in which they come across as demanding,
27 confused, hostile, hyperactive, panicky and circumstantial, and that they may also
28 be restless, evasive and high strung. (*Id.*) Moreover, people with similar profiles

1 exhibit intense overreaction to normal rejection. (*Id.*) Dr. Maloney opined that the
 2 most likely diagnosis is schizo-manic episode, which involves some breakdown in
 3 the thinking processes coupled with a manic-like state. (*Id.* at P00830.) The most
 4 technical diagnosis would be schizophrenia, but petitioner did not show any overt
 5 signs of schizophrenia. Petitioner did seem to have a variety of psychological
 6 problems, however. (*Id.*) Dr. Maloney concluded:

7 The present data suggest that we have an individual who
 8 functions in the normal range of general intelligence with no
 9 suggestion of any specific cognitive-intellectual or perceptual deficit.
 10 He also does not manifest any of the primary signs of a major
 11 condition such as psychosis. Present data do, however, indicate that
 he has significant psychological problems and comes from a very
 unstable background with multiple noted difficulties relating to his
 parents as well as problems between his parents.

12 (*Id.* at P00830.) Dr. Maloney testified at penalty that petitioner's "emotional
 13 disturbances" were evident starting in childhood and went untreated, that
 14 petitioner had the mental capacity to commit the crimes and that he would do well
 15 if he had "extreme limits" placed on him. Counsel did not ask Dr. Maloney to
 16 explain the many psychological problems discussed in his report or to testify about
 17 petitioner's familial problems. Dr. Maloney's testimony, including cross-
 18 examination, comprised just eighteen pages of transcripts. (14 RT 3458-84.)

19 As part of the evidentiary hearing, counsel offered the following testimony:

20
 21 Dr. Maloney determined that Francis suffered from potentially
 22 serious psychological problems, that he exhibited symptoms of
 23 hypomania, schizophrenia and paranoia, suggestive of a state in
 24 which there is some breakdown in the thinking processes combined
 25 with an elevated or manic-like state. Data also indicated that Francis
 26 suffered from feelings of being closed in or trapped and a tendency to
 27 become mad or irritated by fairly mild provocation. Dr. Maloney also
 28 concluded that Francis came from a very unstable background with
 multiple difficulties relating to his parents as well as between his
 parents. In my examination of Dr. Maloney, I brought out his opinion
 that Francis knew what he was doing at the time of the crimes, was
 not psychotic and was legally responsible when he committed the
 crimes, but failed to elicit his additional opinions regarding the
 symptoms of mental problems he noted in his report, and the degree
 of problems within the family. I had no tactical reason for failing to
 elicit this testimony from Dr. Maloney or for not giving him an

1 opportunity to explain the reasons for his opinion.
2 (1CDD 25-26.)

3 Dr. Girsh testified that petitioner was intoxicated at the time of the crimes
4 and that his behavior was out of control and atypical. She diagnosed petitioner
5 with borderline personality disorder but admitted on cross-examination that
6 antisocial personality disorder could apply. Petitioner's history of substance abuse
7 and his many accidents fit with the kind of self-destructive behavior typical of
8 borderline personality. She briefly touched on petitioner's home life, describing it
9 as haphazard, unstructured and amorphous. She testified that nothing indicated
10 that petitioner would be difficult in prison. (14 RT 3577-3603.)

11 As to the testimony of Dr. Girsh, counsel testified as follows:

12
13 I recall that Dr. Girs[h] was upset with me after her testimony. I had
14 prepared her to testify extensively about Francis'[s] adoptive
15 mother's inability to bond with him and the significance of that fact,
16 which I thought was important for the jury to understand. Faye
17 complained that I cut her off and did not give her an opportunity to
present the information she was prepared to give. I did not have a
tactical reason for curtailing my examination of Dr. Girs[h] or for
failing to give her an opportunity to explain the bases for her
opinions.

18 (1 CDD 25.)

19 In advance of trial, counsel gathered various documents and had
20 Dr. Maloney and Dr. Girsh review them. These records included files from the
21 Montessori school petitioner attended, documents concerning the Hernandez
22 family's attempt to adopt a second child and records from the St. Thomas More
23 Clinic where petitioner and his family received counseling while the application to
24 adopt a second child was pending. Trial counsel had his paralegal prepare these
25 documents as exhibits for trial. (1 CDD 24.) In his opening statement, counsel
26 referenced these records twice and said that "[t]he records are somewhat extensive
27 in that the—there are a number of records from a number of different sources that
28 indicate how the defendant got to where the defendant is." (13 RT 3326.) He also

1 told the jury that the experts had examined the records. During his examination of
 2 both experts, counsel established that both Dr. Maloney and Dr. Girsh reviewed all
 3 of the records. (14 RT 347, 3581.) Counsel did not introduce these documents
 4 into evidence, and he failed to ask both Dr. Maloney and Dr. Girsh to discuss the
 5 contents of the records or to explain their significance. Counsel explained:

6
 7 I know that I did not have a tactical reason for not introducing the
 8 records or their substance into evidence. I thought they were more
 9 helpful to the defense than harmful and for that reason gave them to
 10 the experts to review. Once the records were reviewed by the experts,
 11 the prosecutor was entitled to a copy and to cross-examine about their
 12 contents if he chose to do so. That prospect did not bother me.

13 (1 CDD 24-25.)

14 The Court “‘must indulge [the] strong presumption’ that counsel ‘made all
 15 significant decisions in the exercise of reasonable professional judgment.’” *Cullen*
 16 *v. Pinholster*, 131 S.Ct. 1388, 1407 (2011) (quoting *Strickland*, 466 U.S. at 689-
 17 90). However, “[i]t is imperative that all relevant mitigating information be
 18 unearthed for consideration at the capital sentencing phase.” *Caro*, 165 F.3d at
 19 1227. Moreover, counsel had a “duty to investigate and present mitigating
 20 evidence of mental impairment.” *Bean v. Calderon*, 163 F.3d 1073, 1080 (9th Cir.
 21 1998). The Court must consider whether “‘under the circumstances, the
 22 challenged action[s] might be considered sound trial strategy.’” *Pinholster*, 131
 23 S.Ct. at 1407 (2011) (quoting *Strickland*, 466 U.S. at 689).

24 This is not a case where “a defense attorney . . . reasonably decide[d] that
 25 another strategy [was] in order.” *Pinholster*, 131 S.Ct. at 1407 (quoting
 26 *Strickland*, 466 U.S. at 691). Nor is it a case where counsel chose a different
 27 strategy “that any reasonably competent counsel would be compelled to select . . .
 28 over the one actually used.” *Crittendon v. Ayers*, 624 F.3d 943, 969-70 (9th Cir.
 2010). Counsel knew that Dr. Maloney could offer testimony about petitioner’s
 many psychological problems, which Dr. Maloney outlined in his report.

1 Dr. Girsh could offer testimony about Naomi's inability to bond with petitioner.
2 Both experts could have testified about petitioner's dysfunctional and unstable
3 home life and how that environment affected petitioner. Moreover, the preschool,
4 adoption and counseling records would have offered various contemporaneous
5 sources of information about petitioner's early emotional problems and the very
6 unfortunate environment in which petitioner was raised. The documents would
7 have buttressed and augmented the expert testimony. Counsel's failure to elicit
8 appropriate mitigating testimony from his experts and to present the documents he
9 had obtained and prepared for trial was deficient.

10 The record belies respondent's assertion that counsel made a strategic
11 decision to avoid putting this evidence, particularly the documents, before the jury
12 for fear that it would open the door to evidence that petitioner had always been a
13 troubled child. Part of counsel's approach was to show that petitioner's emotional
14 problems began in childhood and that he came from a troubled home. The
15 information contained in the preschool, adoption and counseling records would
16 have shown just that. Moreover, counsel elicited testimony from Dr. Maloney that
17 petitioner suffered from emotional difficulties from an early age. Testimony from
18 Dr. Girsh and Dr. Maloney would have explained the source and effect of those
19 problems, as well as how those problems evolved for petitioner. The records
20 would have provided additional, corroborating information. Trial counsel
21 intended to explore these issues with Dr. Girsh, particularly the effect of Naomi's
22 inability to bond with and care for petitioner. Counsel prepared Dr. Girsh
23 extensively for the penalty phase. In the end, Dr. Girsh's testimony consumed just
24 twenty-six pages of transcripts, and counsel asked her no questions about Naomi's
25 illness. "In this case, it is undisputed that [petitioner] had a right—indeed, a
26 constitutionally protected right—to provide the jury with the mitigating evidence
27 that his trial counsel . . . failed to offer." *Williams (Terry)*, 529 U.S. at 393.

28 Moreover, counsel had both experts testify that petitioner had the capacity to

1 commit the crimes at the penalty phase when that issue was not the primary one
 2 before the jury. The jury had already found petitioner guilty of murder, rape and
 3 sodomy. Counsel focused the experts' testimony on petitioner's mental state at the
 4 time of the crimes but failed to ask the experts about how petitioner's home life,
 5 familial stresses or psychological problems would have mitigated his culpability.
 6 This approach made little, if any, sense. Counsel's performance was deficient.

7 **b. Prejudice**

8 Petitioner must demonstrate prejudice flowing from counsel's errors.
 9 "[T]he question is whether there is a reasonable probability that, absent the errors,
 10 the sentencer . . . would have concluded that the balance of aggravating and
 11 mitigating circumstances did not warrant death." *Pinholster*, 131 S.Ct. at 1408
 12 (quoting *Strickland*, 466 U.S. at 695). The Court must "reweigh the evidence in
 13 aggravation against the totality of available mitigating evidence." *Pinholster*, 131
 14 S.Ct at 1408 (quoting *Wiggins*, 539 U.S. at 534).

15 Trial counsel's deficiencies certainly impacted the penalty phase. Trial
 16 counsel's failure to question Dr. Maloney about petitioner's highly pathological
 17 clinical profile, his "schizo-manic" condition and his many other psychological
 18 problems was certainly prejudicial. The jury heard only that petitioner had
 19 emotional problems and that he suffered from either borderline personality
 20 disorder or antisocial personality disorder. Counsel failed to present other
 21 evidence, in his possession, that would have explained other potential diagnoses,
 22 the source of petitioner's psychological problems and how petitioner's difficulties
 23 affected petitioner's development and explained his conduct. Trial counsel elicited
 24 just enough testimony from Drs. Girsh and Maloney so that the jurors knew
 25 petitioner had some problems, but he did nothing to explain the extent or meaning
 26 of those problems or to give them context. Counsel failed to put before the jury
 27 testimony that petitioner suffered from psychological problems that would have
 28 made him less culpable for the crimes. *See, e.g., Mickey v. Ayres*, 606 F.3d 1223,

1 1239 (9th Cir. 2010) (“In the penalty phase, mental health evidence would explain
2 why, though he had capacity, he was less culpable.”)

3 Moreover, Dr. Girsh could have testified about how Naomi’s schizophrenia
4 affected petitioner. Dr. Clausen testified at the evidentiary hearing that Naomi’s
5 schizophrenia would have made it impossible for petitioner to form a healthy
6 attachment to his mother, resulting in his inability to develop basic trust. (Clausen
7 Decl. at 93-96, ¶¶ 235-40.) Naomi’s severe mental illness also would have
8 prevented petitioner from developing a sense of autonomy, initiative and self-
9 identity. (*Id.* at 96-103, ¶¶ 241-49, 251.) While the jury heard testimony that
10 Naomi was schizophrenic, that label did not explain to them the realities of how
11 her illness would have impacted petitioner’s childhood. The jury was deprived of
12 readily available expert testimony that would have allowed the jurors to make
13 sense of the evidence presented. *Caro v. Calderon*, 165 F.3d at 1227.

14 Petitioner’s emotional struggles were well documented, starting with
15 preschool and continuing during the Hernandez family’s attempt to adopt a second
16 child. Counsel sought records that captured petitioner’s emotional tumult as a
17 preschooler and young child, gave them to his experts for review and prepared
18 them as exhibits for trial. Nevertheless, counsel failed to question the experts
19 about these issues and failed to seek to admit the documents into evidence. The
20 records would have allowed the experts to explain the impact of Naomi’s
21 schizophrenia on petitioner. Counsel also could have used the records to give
22 contemporaneous, illustrative examples of Naomi’s deficient mothering and the
23 consequent behavioral and emotional difficulties petitioner displayed. Expert
24 testimony using the documents would have given context to petitioner’s life.

25 Nevertheless, while counsel’s failures to present evidence he had in his
26 possession certainly prejudiced petitioner, it is not reasonably probable that
27 appropriate expert testimony, admitted together with the omitted records, would
28 have caused the jury to come to a different verdict. While significant, the

1 prejudicial effect of counsel's deficiencies does not rise to the level of prejudice
2 found in the many cases granting relief. *See, e.g., Rompilla*, 545 U.S. at 390-93
3 (granting relief where counsel failed to investigate and present evidence of
4 petitioner's abusive and neglectful childhood and petitioner's organic brain
5 damage); *Williams (Terry)*, 529 U.S. at 395-99 (finding ineffectiveness where
6 counsel failed to investigate and present graphic evidence of petitioner's
7 nightmarish childhood, including severe beatings and foster care while petitioner's
8 parents served prison terms for criminal neglect); *Stankewitz v. Woodford*, 365
9 F.3d 706, 723 (9th Cir. 2004) (granting evidentiary hearing on claim of IAC where
10 counsel failed to investigate and present "an excess of privation and abuses"
11 experienced by petitioner as a child, including severe beatings, foster care and
12 organic brain damage to the point of borderline mental retardation); *Ainsworth*,
13 268 F.3d at 874-78 (granting petition where counsel failed to investigate, develop
14 and present evidence of petitioner's troubled background and emotional
15 instability); *Wallace v. Stewart*, 184 F.3d 1112, 1115-16 (9th Cir. 1999) (granting
16 petition where counsel conducted no factual investigation into petitioner's very
17 dysfunctional background); *Seidel v. Merkle*, 146 F.3d 750, 756 (9th Cir. 1998)
18 (granting petition upon counsel's failure to investigate and present a mental illness
19 defense at penalty); *compare Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir.
20 1987) (finding counsel's decision not to present mitigating evidence reasonable
21 and, assuming deficiency, no prejudice). While petitioner has not demonstrated
22 prejudice sufficient to undermine confidence in the penalty verdict, the Court will
23 consider counsel's deficiencies in the cumulative error analysis.

24 Lastly, petitioner alleges as part of Claim 5(C)(9) that trial counsel failed to
25 call a youth authority counselor to testify that petitioner had not been dangerous
26 when previously incarcerated. Both Dr. Girsh and Dr. Maloney testified that
27 petitioner likely would do well while incarcerated. Evidence from an additional
28 person would have been cumulative and may have opened the door to negative

1 evidence about petitioner's juvenile violations. Counsel was not deficient, nor did
2 his alleged deficiency cause petitioner prejudice.

3 Accordingly, the Court DENIES Claims 5(C)(1), 5(C)(2), 5(C)(4) and
4 5(C)(9) but will consider counsel's deficiencies in the cumulative error analysis.

5 **6. Counsel's failure to investigate and present evidence of**
6 **petitioner's neurological impairment and to obtain a**
7 **complete social and medical history of petitioner (Claims**
8 **5(C)(7) & 5(D)(32))**

9 In Claim 5(C)(7), petitioner contends that trial counsel failed to investigate
10 and develop evidence of petitioner's neurological and mental impairment,
11 including by failing to use petitioner's expert witnesses effectively on the issue of
12 petitioner's mental state at the time of the offenses. In Claim 5(D)(32), petitioner
13 asserts that trial counsel inadequately prepared for petitioner's defense. Counsel's
14 alleged shortcomings include: (1) failure to retain a social historian; (2) failure to
15 obtain a complete medical history or neurological examination of petitioner;
16 (3) failure to consult with experts about the impact of (a), physical, sexual and
17 emotional abuse and neglect, (b) drug and alcohol abuse (c) petitioner's father's
18 views about racism and (d) being an adopted child of mixed-race heritage; and
19 (4) failure to provide all relevant information to experts.

20 **a. Deficiency**

21 As discussed, some evidence in the record may have suggested to counsel
22 that a neurological examination of petitioner was unnecessary. Every expert
23 consulted found that petitioner had the capacity to commit rape and murder.
24 Dr. Girsh diagnosed petitioner with antisocial personality disorder but also
25 testified that petitioner might meet the criteria for antisocial personality disorder.

26 At the same time, Dr. Girsh also told counsel before trial that there was
27 some indication of an organic, neurological basis for petitioner's behavior and that
28 petitioner suffered from dyslexia. (9 CDD at P00427 (Exh. L-7). Dr. Maloney

1 told counsel that petitioner had been psychotic, that petitioner suffered from
2 potentially serious psychological problems and that he had a highly pathological
3 profile. (9 CDD at P00738 (Exh. L-5); JTD P00829.) Ultimately, Dr. Maloney
4 testified at penalty that nothing suggested that petitioner lacked the capacity to
5 commit the crimes. (14 RT 3473.)

6 Ample data did exist, however, that was reasonably available to counsel and
7 that may have influenced both counsel's approach to trial and the experts'
8 evaluations of petitioner. Counsel failed to retain a social historian or to otherwise
9 investigate petitioner's background, and he also failed to obtain petitioner's
10 complete medical history. Due to counsel's failure to conduct basic investigation,
11 none of the experts who evaluated petitioner before trial reviewed records
12 regarding petitioner's birth family, or social history information from petitioner's
13 adopted family, preschool teacher and others. Dr. Maloney and Dr. Girsh knew
14 that petitioner had been referred for a neurological examination at age five, that he
15 had performed poorly on psychological tests and that he engaged in behavior
16 suggesting neurological or psychiatric problems during his preschool years.
17 However, none of the experts knew the following key information: that petitioner
18 inherited a genetic vulnerability to mental illness; that he was born to a 14-year-old
19 mother who abused drugs and alcohol during her pregnancy and who was in a
20 violent relationship; that petitioner's birth father was unemployed, incarcerated
21 and suffered from serious mental illness; that petitioner was delivered with the
22 help of forceps, which are known to cause brain injury; that petitioner suffered
23 many head injuries as a child; that petitioner's preschool teacher was very
24 concerned about petitioner and his home life; that petitioner was described as a
25 troubled and hyperactive child; that petitioner had endured the forcible
26 administration of enemas and other abuse at the hands of his adoptive parents; or
27 that petitioner was largely neglected by both his parents. In addition, various
28 indicators suggested that petitioner suffered from neuropsychiatric impairments.

1 (Gur 6/8/04 Decl. at 4, ¶ 9.) Petitioner’s upbringing included child abuse and
2 neglect, both psychological and physical, which can lead to brain damage or
3 dissociative disorders. (*Id.* at 5, ¶ 9.) Petitioner also had poor impulse control and
4 poor scholastic performance despite normal IQ scores. (*Id.*)

5 “Counsel has a duty to make reasonable investigations or to make a
6 reasonable decision that makes particular investigations unnecessary.” *Strickland*,
7 466 U.S. at 691. “In assessing counsel’s investigation, [the Court must] conduct
8 an objective review of [his] performance, measured for reasonableness under
9 prevailing professional norms, which includes a context-dependent consideration
10 of the challenged conduct as seen from counsel’s perspective at the time.”
11 *Wiggins v. Smith*, 539 U.S. at 523.

12 Here, “[c]ounsel’s failure to investigate [petitioner’s] mental condition
13 cannot be construed as a trial tactic.” *Evans v. Lewis*, 855 F.2d 632 (9th Cir.
14 1988). At the time of petitioner’s trial, which took place in 1983, competent
15 counsel had a duty to investigate a defendant’s background. *See, e.g., Penry*, 492
16 U.S. at 319 (holding, in reviewing a case tried in March of 1980, that “evidence
17 about the defendant’s background and character is relevant because of the belief,
18 long held by this society, that defendants who commit criminal acts that are
19 attributable to a disadvantaged background, or to emotional or mental problems,
20 may be less culpable than defendants who have no such excuse”), *overruled on*
21 *other grounds in Atkins v. Virginia*, 536 U.S. 304 at 321 (2002); *Bean*, 163 F.3d at
22 1080 (“[W]e have previously recognized an attorney’s duty to investigate and
23 present mitigating evidence of mental impairment in the context of a 1979 capital
24 sentencing hearing.”) (citing *Evans v. Lewis*, 855 F.2d 631, 636-37 (9th Cir.
25 1988).); *Cf. Bean*, 163 F.3d at 1080 (“[T]he ineffectiveness at issue in this case did
26 not arise from failure to employ novel or neoteric tactics. Rather, it resulted from
27 inadequacies in rudimentary trial preparation and presentation: providing experts
28 with requested information, performing recommended testing, conducting

1 adequate investigation, and preparing witnesses for trial testimony. These were
2 not alien concepts in 1981, but were an integral thread in the fabric of
3 constitutionally effective representation.”)

4 Counsel’s failure to investigate petitioner’s background and his medical
5 history were not sound trial strategy. *See, e.g., Williams (Tery)*, 529 U.S. at 395-
6 99 (holding that counsel’s failure to investigate and present evidence of
7 defendant’s mental defect and social history constitutes deficient performance);
8 *Caro*, 280 F.3d at 1254 (“[C]ounsel’s failure to investigate and provide
9 appropriate experts with the information necessary to evaluate [petitioner’s]
10 neurological system for mitigation constituted deficient performance within the
11 meaning of *Strickland*.”); *see also Frierson v. Woodford*, 463 F.3d 982, 989 (9th
12 Cir. 2006) (“The imperative to cast a wide net for all relevant mitigating evidence
13 is heightened at a capital sentencing hearing because ‘the Constitution prohibits
14 imposition of the death penalty without adequate consideration of factors which
15 might evoke mercy.’”) (quoting *Caro*, 165 F.3d at 1227).

16 Moreover, counsel relied in part on a clinical psychologist retained by prior
17 counsel. While trial counsel did retain an additional clinical psychologist, he
18 failed to conduct enough investigation to make an informed decision about what
19 sorts of other experts to consult or about what information to give the experts he
20 did retain. Counsel has an obligation to conduct an investigation that will allow
21 counsel to figure out what sort of experts to consult, and then counsel must present
22 those experts with relevant information. *Caro*, 165 F.3d at 1226-27. Counsel’s
23 inadequate investigation resulted in counsel failing to consult a neurologist,
24 neuropsychologist or neuropsychiatrist, or to arrange for a neurological
25 examination of petitioner, despite information in counsel’s file suggesting the
26 utility of such an approach. Counsel had no tactical reason for not requesting a
27 neurological examination. (1 CDD 34; *see also* 1 CDD 34-35 (“Evidence of
28 neurological impairment is the type of evidence I wanted because it would have

1 helped to explain and mitigate Francis'[s] state of mind at the time of the
 2 killings.'')) Counsel owed a duty to locate experts who could explain medical or
 3 neurological issues to the jury. For example,

4
 5 Although the defendant in *Caro* was examined by four experts
 6 prior to trial, including a medical doctor, a psychologist, and a
 7 psychiatrist, none of whom indicated that the defendant suffered from
 8 mental impairment severe enough to constitute diminished capacity,
 9 [the Ninth Circuit] concluded that defense counsel was ineffective for
 10 failing to consult an appropriate expert with expertise in neurology or
 toxicology. [Petitioner] had been exposed to high levels of toxic
 chemicals and pesticides as a child, and because none of the experts
 were neurologists or toxicologists, none was able to conduct the
 neurological testing needed to evaluate the effects that the pesticides
 and chemicals had on [petitioner's] brain.

11 *Frierson*, 463 F.3d at 992 (internal quotation marks omitted). Likewise, petitioner
 12 was exposed to alcohol, drugs and violence in utero; was delivered with the help of
 13 forceps; suffered many accidents as a child, many of them involving head trauma;
 14 was abused by his parents; and began abusing alcohol and drugs in elementary
 15 school. Also, readily available information that counsel could have obtained
 16 through an adequate investigation would have raised additional questions about
 17 whether petitioner suffered from neurological problems. None of the experts was
 18 capable of conducting the neurological testing necessary to evaluate the effects of
 19 these circumstances on petitioner's brain. Counsel performed deficiently. *See*
 20 *Kenely v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991) ("Failing to interview
 21 witnesses or discover mitigating evidence relates to trial preparation and not trial
 22 strategy."); *cf Bean v. Calderon*, 163 F.3d at 1079 (Counsel's "presentation of
 23 the[] mental health experts' testimony did not arise from the requisite informed
 24 judgment.") (internal quotation marks omitted). Counsel also failed to elicit
 25 testimony at trial regarding the impact of Naomi's schizophrenia on petitioner.
 26 (*See, supra*, Discussion of Claims 5(B)(3)(c) & 5(C)(3). Moreover, although
 27 counsel testified that he knew petitioner had been abused by his parents, counsel
 28 apparently did not explore this issue with his experts or elicit testimony regarding

1 the abuse at the penalty phase.

2 **b. Guilt phase prejudice**

3 Petitioner argues that had counsel investigated petitioner's mental and
4 neurological impairments and conducted a social history, then counsel could have
5 presented a guilt phase defense that petitioner was unable to form the requisite
6 intents. Petitioner has failed to show guilt phase prejudice.

7 Petitioner suffers from brain damage that is likely organic, meaning that it
8 was caused by a head injury, either in utero, later or both. (Gur 2/8/05 Decl. at 14,
9 ¶ 27.) Petitioner's mother abused substances and was in a violent relationship
10 during her pregnancy, petitioner was delivered with the help of forceps and
11 petitioner was involved in many incidents of head trauma as a child, adolescent
12 and teen. (*Id.*) Petitioner's congenital brain damage probably was complicated by
13 the home life in which he was raised. (*Id.* at 10, ¶ 18.) The brain damage affects
14 various regions of petitioner's brain and causes petitioner to struggle with verbal
15 memory impairment and interpreting emotional information, both of which are
16 exacerbated by extreme emotion or stress. (*Id.* at 10-11, ¶ 18-20.)

17 Neuropsychological tests available in 1982 and 1983 would have uncovered
18 these impairments, but no one conducted a neuropsychological evaluation of
19 petitioner at the time of trial. (*Id.* at 11-12, ¶¶ 21- 22.) The limited testing given
20 to petitioner by Dr. Maloney was not equivalent to "a comprehensive
21 neuropsychological evaluation under the then-prevailing professional standards."
22 (*Id.* at 12, ¶ 22.) According to Dr. Gur, petitioner's brain damage existed at the
23 time of the crimes and prevented petitioner from understanding or responding
24 appropriately to his victims' expressions of resistance and fear. His inability to
25 perceive emotion accurately makes it difficult for petitioner to judge things
26 correctly, especially in an emotionally volatile situation. (*Id.* at 15, ¶ 29.)
27 Moreover, Dr. Gur concluded that petitioner's brain damage caused petitioner to
28 be in a dissociative state when he committed the crimes, preventing him from

1 forming the intent to commit murder and rape. Petitioner's dissociation would
2 have helped explain petitioner's detailed confession, his inability to recall the
3 details of the crimes during his testimony and his persistent inability to explain
4 why he committed the crimes. (*Id.* at 17, ¶ 35.) Specifically, evidence of
5 dissociation would have allowed counsel to argue that petitioner did not actually
6 remember the details of the crime, but, instead, that the police fed him much of the
7 information following his arrest. Petitioner subsequently confessed in great detail.
8 Despite his confession, petitioner could not in fact remember many things about
9 the crime because he was in a dissociative state. Accordingly, counsel could argue
10 that petitioner was testifying truthfully at the penalty phase when he stated that he
11 could not recall many things about the crimes.

12 Dr. Lewis also testified that petitioner's capacity to form the specific intent
13 to rape and kill was substantially impaired on the night of the crimes due to "a
14 constellation of neuropsychiatric vulnerabilities . . . and extreme intra-family
15 stressors . . . which engendered his extreme[,] uncontrollable[,] violent acts. The
16 knowledge of these biopsychosocial vulnerabilities and the appreciation of their
17 role in [the] offenses are vital to understanding his compromised mental
18 functioning on the nights of the murder[s]." (Lewis 8/13/03 Decl. at 37, ¶ 86.)

19 This evidence certainly could have helped at trial. Evidence that petitioner
20 could not in fact form the specific intent to murder or rape would have provided a
21 more solid defense than one relying only on petitioner's intoxication alone. While
22 petitioner has put forth evidence that could have caused at least one juror to vote
23 differently, petitioner has not demonstrated by a reasonable probability that this
24 new evidence would have been successful at the guilt phase. Even if petitioner
25 used experts to explain why the confession was detailed but petitioner later could
26 not recall much at trial, a reasonable jury likely would have rejected a diminished
27 capacity defense. The very similar factual circumstances of the crimes, taking
28 place just a week apart, could support a conclusion that petitioner was able to

1 premeditate, deliberate or plan, all of which undercut a diminished capacity
 2 defense. Finally, within a year and a half of trial, a voter referendum changed the
 3 law to eliminate the dense of diminished capacity due to mental disease, defect or
 4 mental disorder. *See* Cal. Penal Code § 28. That context may have lessened the
 5 likelihood of success of a diminished capacity defense at the guilt phase.

6 Accordingly, the Court DENIES Claims 5(C)(7) and 5(D)(32) to the extent
 7 they raise guilt phase claims but will consider counsel's deficiencies in the
 8 cumulative error analysis.

9 **c. Penalty phase prejudice**

10 In evaluating prejudice at the penalty phase, the Court must weigh the
 11 evidence in aggravation against the evidence in mitigation, including the evidence
 12 counsel could have presented but did not. Petitioner must show a reasonable
 13 probability of a different verdict. *Williams (Terry)*, 529 U.S. at 398.

14 "More than any other singular factor, mental defects have been respected as
 15 a reason for leniency in our criminal justice system. *Caro*, 280 F.3d at 1258.
 16 While counsel presented some evidence of petitioner's emotional problems, that
 17 testimony did not come close to painting an accurate picture of petitioner's
 18 neurological deficits. Dr. Gur testified that petitioner's brain damage has greatly
 19 impacted the way petitioner both perceives the world and functions in
 20 relationships. Petitioner harbors a skewed picture of reality. He suffers from a
 21 profound impairment in his ability to perceive emotions accurately, often
 22 mistaking happiness and sadness for anger and fear. Petitioner has suffered from
 23 this problem as early as preschool, and it is heightened when he is experiencing
 24 extreme emotion or stress. Petitioner attempts to cope with his inability to
 25 perceive emotions accurately by using other cues, but this coping mechanism is
 26 quite limited due to the mental illness of petitioner's adoptive parents. (Gur 2/8/05
 27 Decl. at 12, ¶¶ 23-24.)

28 Moreover, petitioner's brain damage also may explain his inability to recall

1 the details of the crime when questioned by the police. Petitioner testified in his
2 deposition that the police spent several hours discussing the crime and showing
3 him pictures before recording his detailed statement. However, petitioner's
4 penalty phase testimony was replete with assertions that petitioner could not
5 remember what happened. (*Id.* at 15-16, ¶¶ 30-32.) The clinical data suggest that
6 petitioner actually cannot recall significant parts of the crime, not that he is being
7 evasive or feigning forgetfulness. (*Id.* at 16, ¶ 31.) Dr. Clausen also opined that
8 petitioner dissociated as a coping mechanism and that he dissociated during the
9 crimes. (Clausen Decl. at 188-124, ¶¶ 284-89, 291-92, 294-96; *see also* Lewis
10 8/15/03 Decl. at 33-34, ¶ 82 (opining that the circumstances of Ryan's murder
11 suggest that petitioner was in a dissociative state).)

12 Counsel's failure to investigate and present petitioner's deeply troubled
13 home life was also quite damaging. As part of the evidentiary hearing, several of
14 petitioner's experts have created social histories. Dr. Clausen testified that
15 petitioner has experienced recurring trauma, from his conception through the
16 crime. This trauma included having a neglectful primary caretaker afflicted with
17 schizophrenia and a paranoid, oft-absent father. She discussed, at length, the
18 impact of petitioner's schizophrenic mother on petitioner. Dr. Lewis diagnosed
19 petitioner with bipolar mood disorder. (Lewis 8/15/03 Decl. at 36, ¶ 84.)

20 Counsel's failure to investigate petitioner's background and medical history
21 and to have a neurological exam conducted resulted in a haphazard, incoherent
22 mitigation case. Counsel failed to put on evidence that would have served
23 counsel's stated goal in his penalty phase opening argument: to "indicate how the
24 defendant go to be where the defendant is" and "the type of individual that the
25 defendant was at the time of the commission of the offenses and potentially the
26 type of individual he is today." (13 RT 34326.)

27 Counsel could have presented evidence, however, that would have
28 explained how petitioner became who he was at the time of the crimes. Dr. Gur

1 explained the effect of petitioner's brain damage this way:

2
3 I would think that he started off with a bad brain because of his
4 biological background. Growing up as a fetus in a 14-year-old girl
5 who abuses alcohol during pregnancy, I mean, we already know that
6 children born to 14 year olds and 15 year olds or even 16 year olds
7 have significant deficits as a group. So some brain damage comes
8 just right from there.

9
10 Mother consuming alcohol, the more we know about the effects
11 of alcohol during pregnancy, the more we find that they are much
12 more devastating than we ever thought Then you have the
13 forceps delivery, and then you have evidence of child neglect, abuse,
14 physical punishments, inept parenting by the adoptive parents.

15
16 You then have a series of head injuries from motorcycle
17 crashes and other forms of head injuries. You add to that early
18 substance abuse, which often happens with those kids. They know
19 there is something screwed up about their brains, so a lot of times
20 they medicate themselves. Street drugs make them feel better in the best
21 case or give them a rational explanation for their abnormal thought
22 processes in the worst case. And they, themselves, as I mentioned, they go
23 straight to the frontal lobe and retard the development of the frontal lobe.

24
25 You put all of that together, and the mystery becomes how he
26 managed to reach 18 without committing serious crimes before that?

27 (Gur Depo. at 461.) Dr. Gur also touched on the impact of petitioner's home life:

28 "At best, I understand, his mother was ineffective and withdrawn and eventually
left the home. And his father was prone to outbursts of anger and rage and was
abusive psychologically and physically. So you put that factor in with someone
who has the vulnerability that Francis had growing up, and it's a prescription for
disaster. It's a prescription for someone who will really never develop normally
and will not have much of a chance to develop the mental and intellectual and
personal capacity to cope with life's stresses." (Gur Depo. at 447; *see also* Lewis
8/15/03 Decl. at 31, ¶ 77 (testifying that "[i]t is hard to imagine how a more
genetically resilient child could have weathered the family environment and
adapted appropriately to society, much less a child with Francis's inherent
vulnerabilities to mental illness."); 2 Lewis Depo. at 382 (testifying that a
vulnerable child raised in a psychotic environment with incredible stress creates an

1 aberrant human being who cannot function as others do).)

2 In addition, counsel completely missed an opportunity to tell a narrative that
3 could have evoked mercy. As Dr. Clausen testified:

4
5 The story of Francis Hernandez is a harrowing tale of genetic
6 and environmental risk, extensive child abuse and profound child
7 neglect, chronic traumatization by a severely mentally ill primary
8 caretaker in the context of a markedly impaired co-parent unable
9 and/or unwilling to provide minimal protection, and a baffling series of
10 missed opportunities for intervention and tertiary prevention by family
11 members and mental health, education, and juvenile justice professionals.
12 As was feared by and foreshadowed with the comments of his closest family
13 members, Francis lived a childhood that was literally a recipe for disaster
14 and tragedy. His genetic and adoptive families, together with the
community in which he lived, produced an adolescent entirely unequipped
to understand his social world, negotiate interpersonal relationships,
appropriately manage strong emotions, and seek help for himself. He was
rejected in utero, abandoned at birth, neglected during infancy, abused
throughout childhood, and ignored during adolescence. It is impossible to
place oneself in the shoes of Francis Hernandez at the time of the capital
crimes for which he has been convicted simply because the rest of us cannot
possibly imagine the daily hell in which he spent his life.

15 (Clausen Decl. at 127, ¶ 305; *see also* Clausen Depo at 119 (“I see more the
16 psychotic mothering that he received growing up as the most central factor in
17 developing who he was as an individual, and resulting in who he was and what
18 sorts of coping strategies he had, and the resources he didn’t have; that the
19 physical and sexual abuse and the role that his father played and the role that his
20 genetic history played were all important and significant, but the most central
21 feature about what was going on was the psychotic mother.”).)

22 Counsel’s failure to conduct an adequate investigation into petitioner’s
23 background, his medical history and his neurological impairments had serious
24 consequences at the penalty phase. Counsel’s failures deprived petitioner of the
25 effective assistance of counsel. *See, e.g., Rompilla*, 545 U.S. at 390-93 (granting
26 petition where counsel failed to uncover evidence that petitioner suffered from
27 organic brain damage, that petitioner often had no a caretaker as a teenager and
28 that the house was filthy); *Williams (Terry)*, 529 U.S. at 395-99 (finding counsel

1 ineffective upon failing to investigate and present evidence of petitioner's
 2 nightmarish childhood); *Ainsworth*, 268 F.3d at 874-78 (granting relief where
 3 counsel failed to investigate and present evidence of petitioner's troubled
 4 background and emotional instability); *Wallace v. Stewart*, 184 F.3d 1112, 1115-
 5 16 (9th Cir. 1999) (granting petition where counsel conducted no factual
 6 investigation into petitioner's dysfunctional background). Petitioner has
 7 demonstrated prejudice sufficient to undermine confidence in the penalty verdict,
 8 by showing a likelihood of a different verdict at the penalty phase.

9 Accordingly, the Court GRANTS Claims 5(C)(7) and 5(D)(32) as to the
 10 penalty phase and will also consider counsel's deficiencies in the cumulative error
 11 analysis.

12 **7. Counsel's failure to challenge petitioner's competence to**
 13 **confess, testify and stand trial (Claim 5(D)(26))**

14 In Claim 5(D)(26), petitioner contends that trial counsel failed to investigate
 15 the gravity of petitioner's mental, emotional and psychological impairment before,
 16 during and after the crime, as well as during his confinement in county jail. As a
 17 result, trial counsel failed to challenge petitioner's competence to give a statement
 18 to the police, to testify and to stand trial.

19 "It has long been accepted that a person whose mental condition is such that
 20 he lacks the capacity to understand the nature and object of the proceedings against
 21 him, to consult with counsel, and to assist in preparing his defense may not be
 22 subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). The test for
 23 competence to stand trial is whether the defendant "has sufficient present ability to
 24 consult with his lawyer with a reasonable degree of rational understanding—and
 25 whether he has a rational as well as factual understanding of the proceedings
 26 against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam)
 27 (internal quotation marks omitted). "[C]ompetence to stand trial does not consist
 28 merely of passively observing the proceedings. Rather, it requires the mental

1 acuity to see, hear and digest the evidence, and the ability to communicate with
 2 counsel in helping prepare an effective defense.” *Odle v. Woodford*, 238 F.3d
 3 1084, 1089 (9th Cir. 2001). “Although no particular facts signal incompetence,
 4 suggestive evidence includes a defendant’s demeanor before the trial court,
 5 previous irrational behavior, and available medical evaluations.” *Moran v.*
 6 *Godinez*, 57 F.3d 690, 695 (9th Cir. 1994).

7 “[A]lthough retrospective competency hearings are disfavored, they are
 8 permissible whenever a court can conduct a meaningful hearing to evaluate
 9 retrospectively the competency of the defendant.” *Id.* at 696 (internal citations
 10 omitted). “[M]edical reports contemporaneous to the time of the initial hearing
 11 greatly increase the chance for an accurate retrospective evaluation of a
 12 defendant’s competence.” *Id.*; *see also Deere v. Woodford*, 339 F.3d 1084,
 13 1086–87 (9th Cir. 2003) (pointing to a doctor’s examination of petitioner within
 14 several days of guilty plea as particularly probative of his mental status at trial).

15 Petitioner has submitted a great deal of evidence concerning his mental state
 16 as part of the evidentiary hearing. This evidence includes testimony that petitioner
 17 suffers from bipolar mood disorder and organic brain damage. (Lewis 8/15/03
 18 Decl. at 34-36, ¶ 84; Gur 2/8/05 Decl. at 10, ¶ 18.) Brain damage impairs
 19 petitioner’s ability to organize and recall information, causes petitioner to
 20 misperceive emotions and makes it difficult for petitioner to modulate his
 21 emotional response appropriately. (Gur 2/8/05 Decl. at 10-11, ¶¶ 18-20.) This
 22 evidence does not suggest, however, that petitioner lacked the capacity to
 23 understand that he was being tried for capital murder and faced the death penalty.
 24 While many of petitioner’s experts have testified that he lacked the capacity to
 25 form the requisite intents at the time of the crime, none has testified that he was
 26 incompetent to stand trial. (Lewis 8/15/03 Decl. at 37, ¶ 87; 6/8/04 Decl. at 15-17,
 27 ¶¶ 30-32, 35.) Moreover, none of the experts who evaluated petitioner at the time
 28 of trial found him incompetent. Petitioner has not met his burden of establishing

1 by a preponderance of the evidence that he was incompetent to stand trial.

2 Accordingly, the Court DENIES Claim 5(D)(26).

3 **8. Counsel's decision to put petitioner on the stand at the**
 4 **penalty phase (Claim 5(D)(27))**

5 In Claim 5(D)(27), petitioner contends that trial counsel made a misguided,
 6 inappropriate and ill-considered decision to put petitioner on the stand during the
 7 penalty phase. Petitioner also argues that his mental condition caused him to
 8 appear unsympathetic and cold, which alienated the jury. Furthermore, trial
 9 counsel exacerbated the prejudice to petitioner by failing to investigate and present
 10 mental health evidence that would have explained petitioner's affect.

11 Counsel moved for separate juries for the guilt and penalty phases because
 12 he wanted petitioner to testify at the guilt phase. Counsel thought that petitioner
 13 would need to testify at the guilt phase to establish the amount of alcohol he
 14 consumed before the crimes. However, counsel did not want petitioner to testify at
 15 the penalty phase due to his appearance, his ability to testify and the content of his
 16 testimony. (10 CDD 40-41.) The trial court denied the motion.

17 Inexplicably, counsel put petitioner on the stand at the penalty phase.
 18 Counsel wanted petitioner to testify about his background and home life, but
 19 counsel asked only about the facts of the crime. (1 CT 289; 10 CDD 40-43; 13 RT
 20 3398-3415.) On cross examination, the prosecutor questioned petitioner
 21 extensively about the facts of the crime. (13 RT 3416-65; 14 RT 3486-3551.)
 22 Petitioner testified countless times that he could not remember many of the
 23 gruesome details of the crimes to which he had confessed, making him seem cold,
 24 callous and uncaring. (*See generally*, 13 RT 3416-65; 14 RT 3486-3551.) He also
 25 testified that neither victim was crying or upset during the crimes. (13 RT 3432-
 26 33; 14 RT 3534-3.) Petitioner's testimony, including lengthy cross examination,
 27 consumed much more time than any other penalty phase witness.

28 Counsel performed incompetently. First, counsel put petitioner on the stand

1 at the penalty phase, despite his earlier decision that petitioner would not make a
2 good penalty phase witness. This is not a case where counsel “could not have
3 predicted just how damaging placing [petitioner] on the stand would be.” *Allen v.*
4 *Woodford*, 395 F.3d 979, 1000 (9th Cir. 2005). No rational, reasoned basis
5 supported this decision. Moreover, counsel questioned petitioner only about the
6 facts and circumstances of the crime, rather than about petitioner’s personal
7 background. *See Harris v. Wood*, 64 F.3d 1432, 1437 (9th Cir. 1995) (finding
8 deficient counsel’s failure to question defendant in accordance with counsel’s
9 purpose in calling defendant to testify). Even worse, petitioner’s testimony that he
10 could not remember many details of the crime made petitioner seem unremorseful
11 and cruel. Petitioner’s testimony that the victims were not crying or upset during
12 the crime were statements that “a reasonable jury could have easily chosen to
13 disbelieve” as “self-serving uncorroborated testimony.” *United States v.*
14 *Nicholson*, 677 F.2d 706, 709 (9th Cir. 1982); *see also United States v. Cisneros*,
15 448 F.2d 298 (9th Cir. 1971) (“A trier of fact is not compelled to accept and
16 believe the self-serving stories of vitally interested defendants. Their evidence
17 may not only be disbelieved, but from the totality of the circumstances, including
18 the manner in which they testify, a contrary conclusion may be properly drawn.”)
19 Counsel’s performance fell below an objective standard of reasonableness.

20 Petitioner’s penalty phase testimony, which focused exclusively on the
21 circumstances of the crime, caused petitioner unmitigated prejudice. Petitioner’s
22 testimony consumed the bulk of the evidence presented at the penalty phase. As
23 counsel predicted before trial, petitioner’s ability to testify and the content of his
24 testimony did nothing to mitigate the crime. Petitioner appeared callous and
25 dishonest, and the prosecutor argued those points. (14 RT 3636-64 (“[H]e was not
26 telling the truth. Either—when he says[,] [‘]I don’t remember,[’] he is either such
27 a callous individual that he really doesn’t remember—what would a normal person
28 remember concerning what happened in this case? A normal person would

1 probably think about it constantly, have nightmares about it, and relive it every
2 moment of the day. Is that the type of individual we have . . . or a person who
3 isn't and won't admit what he did and who lies about it when he say[s], 'I don't
4 remember. After all it was 20, 25 months ago[.]''))

5 Moreover, petitioner's testimony did not make him seem less culpable. In
6 fact, his repeated assertions that he could not recall the facts of the crime and his
7 testimony that the victims did not cry or seem upset made him seem markedly
8 *more* culpable than less. Counsel also failed to take other steps that would have
9 ameliorated the harm caused by petitioner's testimony, and those errors
10 exacerbated the situation. For example, counsel could have had Dr. Maloney
11 testify about petitioner's psychological problems, and that testimony might have
12 explained petitioner's odd affect while testifying. (JTD at P00829-30; *see also*
13 Discussion of Claim 5(C)(1), 5(C)(2), *supra.*) Moreover, if counsel had requested
14 a neurological examination of petitioner, an expert could have testified about
15 petitioner's inability to accurately perceive emotions and to modulate his
16 emotional response appropriately. (Gur 2/8/05 Decl. at 10-11, ¶¶ 18-20; *see also*
17 Discussion of Claim 5(C)(7), *supra.*) Such testimony would have helped to
18 explain petitioner's testimony that the victims were not upset or that he did not
19 know they were upset. Finally, if counsel had conducted an adequate investigation
20 into petitioner's background, he could have put other witnesses on the stand to
21 discuss petitioner's background. Many lay witnesses were able and willing to
22 discuss petitioner's life, other than those who offered thin pleas for mercy at the
23 penalty phase. (*See, e.g.*, declarations of Barbara Graziano (maternal aunt), Joy
24 Turner (preschool teacher), Judy Williams (ex-girlfriend's mother), Morris
25 Silverstein (childhood friend); *see also* Discussion of Claims 5(B)(3)(C) and
26 5(C)(3), *supra.*) An adequate investigation also would have revealed evidence that
27 petitioner had a history of dissociation. Expert testimony that he was in a
28 dissociative state at the time of the crimes would have explained petitioner's

1 inability to recall the details of the crimes at the penalty phase. (Clausen Decl. at
 2 118-24, ¶¶ 284-89, 291-92, 294-96; Lewis 8/15/03 Decl. at 27-28, ¶¶ 68-70 & 36-
 3 37, ¶ 85-87; Gur 6/8/04 Decl. at 17, ¶ 35; *see also* Discussion of Claims 5(C)(7),
 4 5(D)(32), *supra*.)

5 Counsel's decision to put petitioner on the stand, without any psychological
 6 evidence to explain petitioner's demeanor, was utterly devastating.

7 Accordingly, the Court GRANTS Claim 5(D)(27).

8 **C. Other IAC Claims**

9 **1. Counsel's failure to challenge the State's theory that Kathy** 10 **Ryan was kidnapped (Claim 5(D)(2))**

11 In Claim 5(D)(2), petitioner alleges that trial counsel failed to challenge the
 12 State's contention that Kathy Ryan was kidnapped from her home on the evening
 13 of her murder, as evidence tending to show that Ryan willingly met petitioner on
 14 the night of the murder would have supported petitioner's claim that Ryan
 15 consented to having sex with him.

16 Again, petitioner must show that counsel performed deficiently and that this
 17 deficient performance prejudiced petitioner. *Wiggins*, 539 U.S. at 521.

18 Petitioner cannot show deficiency or prejudice. Kathy Ryan's stepmother,
 19 Barbara Ryan, offered the following testimony at trial: At about 5:30 the morning
 20 Kathy's body was discovered, Barbara awoke to find the living room lights on and
 21 the front sliding glass doors and screens open. She went to Kathy's bedroom and
 22 found that Kathy's lights were on, Kathy's bed was still made and Kathy's
 23 bedroom window was open with no screen in it. A few hours later, Barbara
 24 discovered Kathy's pool cue and jacket on the living room floor near the open
 25 sliding glass door. On her way to her car, Barbara found Kathy's purse outside by
 26 the pool with the contents spilled out on the ground. (8 RT 1831-35.)

27 Given this evidence, petitioner can show neither deficiency nor prejudice.
 28 Counsel could have concluded that it would have been futile, and potentially

1 damaging to counsel's credibility, to attempt to argue that Kathy Ryan left
 2 willingly with petitioner. *See Rupe v. Wood*, 93 F.3d 1434, 1440 (9th Cir. 1996)
 3 (holding that failure to take futile action can not be ineffective). Moreover, even if
 4 counsel did attempt to challenge the kidnapping allegation, it would be quite
 5 attenuated for counsel to argue successfully that because Kathy Ryan may have
 6 met petitioner willingly on the night of the murder, she also consented to having
 7 sex with him. The physical evidence strongly suggested that Kathy Ryan was
 8 raped prior to her death and that she likely was penetrated forcefully by an object.
 9 (9 RT 2002, 2017-20, 2029-30.) Petitioner cannot prevail on Claim 5(D)(2).

10 Accordingly, the Court DENIES Claim 5(D)(2).

11 **2. Counsel's failure to put on evidence about petitioner's level**
 12 **of inebriation on the nights of both crimes (Claim 5(D)(3))**

13 In claim 5(D)(3), petitioner argues that trial counsel failed to elicit
 14 corroborating evidence from eye witnesses that petitioner consumed large
 15 quantities of alcohol and drugs on the nights of both crimes.

16 As with the other claims of IAC, petitioner must show that counsel
 17 performed deficiently and that counsel's inadequate representation prejudiced
 18 petitioner. *Wiggins*, 539 U.S. at 521.

19 Trial counsel put Christopher Esparza on the stand. Esparza spent the
 20 afternoon preceding Kathy Ryan's murder with petitioner. (12 RT 3023-26.)
 21 Esparza testified that while he and petitioner were together, they stopped at a
 22 liquor store and purchased two six-packs of beer. (12 RT 3024.) Esparza saw
 23 petitioner drink at least four beers during their last hour together. (12 RT 3025-
 24 26.) In addition, trial counsel presented the testimony of Dr. Amer Rayyes, who
 25 testified that petitioner is an alcoholic and that every time petitioner drank, he
 26 would drink until he was intoxicated. (12 RT 3058.) Petitioner's confession
 27 stated that he was drunk on the night of Edna Bristol's murder. (Confession
 28 Transcript at 3.)

1 Petitioner cannot prevail by alleging that counsel failed to put on cumulative
2 evidence. *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998) (holding that
3 “it was not unreasonable for counsel not to pursue such testimony when it was
4 largely cumulative of the testimony” already offered). Moreover, petitioner cannot
5 show prejudice. The jury heard evidence that petitioner had been drinking heavily
6 preceding both murders and heard expert testimony about the effect alcohol had on
7 him. Petitioner has shown neither deficiency nor prejudice.

8 Accordingly, the Court DENIES Claim 5(D)(3).

9 **3. Counsel’s failure to investigate the audio-taped confession**
10 **for tampering (Claim 5(D)(4))**

11 In Claim 5(D)(4), petitioner contends that trial counsel failed to conduct an
12 adequate investigation of the audio-taped confession for any possible tampering
13 with the tape. Trial counsel also failed to have petitioner listen to the tape and
14 provide his comments on it, or to question petitioner about the circumstances
15 surrounding the confession.

16 Again, petitioner must show that counsel performed deficiently and that
17 counsel’s deficiency prejudiced petitioner. *Wiggins*, 539 U.S. at 521.

18 Petitioner has not put forth any allegations or evidence to show what
19 counsel would have learned if he had conducted an independent examination of
20 the audio-taped confession for possible tampering. He also has not provided any
21 evidence of what petitioner would have told counsel if petitioner had listened to
22 and commented on the confession. Petitioner’s “claim of [deficiency and]
23 prejudice amounts to mere speculation.” *Cooks v. Spalding*, 660 F.2d 738, 740
24 (9th Cir. 1981); *see also James v. Borg*, 24 F.3d at 26.

25 Accordingly, the Court DENIES Claim 5(D)(4).
26
27
28

1 **4. Counsel's failure to challenge probable cause to arrest**
2 **petitioner and search his van (Claim 5(D)(5))**

3 In Claim 5(D)(5), petitioner alleges that trial counsel failed to rebut the
4 prosecution's contention that the arresting officers had sufficient probable cause to
5 arrest petitioner and to search his van.

6 As stated, petitioner must show that counsel's performance fell below the
7 standard of care and that this deficiency prejudiced petitioner. *Wiggins*, 539 U.S.
8 at 521. "Where defense counsel's failure to litigate a Fourth Amendment claim
9 competently is the principal allegation of ineffectiveness, the defendant must also
10 prove that his Fourth Amendment claim is meritorious and that there is a
11 reasonable probability that the verdict would have been different absent the
12 excludable evidence in order to demonstrate actual prejudice." *Kimmelman v.*
13 *Morrison*, 477 U.S. 365, 375 (1986).

14 Petitioner argues that "[a] significant aspect of probable cause to search [his]
15 van was the alleged observation of a carpet that was similar to fibers found in one
16 of the victim's pubic hairs." (Petr's 8/23/07 Brief at 21). Petitioner also contends
17 that "[t]he police claimed to have seen a 'rust-brown' carpet on the floor of Mr.
18 Hernandez's van." (*Id.*) In support of these contentions, petitioner points to the
19 prosecutor's opening argument, which noted that the coroner found burnt orange
20 and rust-colored carpet fibers, the same as the carpet found in petitioner's van, on
21 victim Edna Bristol. (8 RT 1750.) He also cites the statements of police officer
22 Ronald Nelson. Officer Nelson testified that carpet was pulled over the backseat
23 of petitioner's van, but that he could still see part of the carpet, which appeared to
24 be "red" or "rust-colored" and that he saw "several rubber bands, green and brown,
25 on the shifting column of the vehicle." (1 RT 68A-69A.)

26 Petitioner alleges that the arresting officer could not have observed the
27 carpet in the back of petitioner's van and that counsel performed deficiently in
28 both failing to discover that impossibility and arguing that there was no probable

1 cause to search the van. For example, police officer Mac Lyman testified at trial
 2 that “[y]ou could only see the driver’s compartment of the van. There was a
 3 blanket covering the rear portion of the van.” (11 RT 2858, 2861.) Another
 4 witness, Robert Beeler, testified that he thought the windows on petitioner’s van
 5 had been painted. (9 RT 2196.)

6 At the motion to suppress the confession, however, the prosecution offered
 7 the testimony of Long Beach police officer Paul Chastain, who located and looked
 8 inside petitioner’s van before it was searched. (1 RT 213A-214A.) Officer
 9 Chastain testified that he saw orange carpet inside the van. (1 RT 214A.) While
 10 he testified that he could not see anything in the rear of the van (1 RT 221A-
 11 222A), he did see orange-colored carpet “between the seats,” and “on the driver’s
 12 side,” “on the floor.” (1 RT 225A.) Given this testimony, it is difficult for
 13 petitioner to establish that counsel performed deficiently by failing to argue that
 14 the police could not see the color of the carpet from outside the van.

15 Even if counsel performed deficiently, petitioner cannot show prejudice. As
 16 stated in *Strickland*, “a court need not determine whether counsel’s performance
 17 was deficient before examining the prejudice suffered by the defendant as a result
 18 of the alleged deficiencies If it is easier to dispose of an ineffectiveness claim
 19 on the ground of lack of sufficient prejudice, which we expect will often be so,
 20 that course should be followed.” *Strickland*, 466 U.S. at 697. Petitioner “must
 21 establish that had” counsel challenged the visibility of the carpet fibers from
 22 outside the van, then “there was a reasonable probability that the evidence would
 23 have been suppressed” and petitioner would have enjoyed a more favorable
 24 verdict. *Lowry v. Lewis*, 21 F.3d 344, 346-47 (9th Cir. 1994) (citing *Morrison*,
 25 477 U.S. at 375). First, the conflicting testimony about the visibility of the carpet
 26 from outside the van might have caused counsel to raise different arguments at the
 27 suppression hearing, but those arguments would not necessarily have negated a
 28 finding of probable cause. *Cf. Gerstein v. Pugh*, 420 U.S. 103, 121 (1974) (“[A

probable cause determination] does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt.”) In addition, there likely was probable cause to search petitioner’s van even without the orange-colored carpet fibers. The police found “[t]wenty-three small turquoise rubber bands . . . on the ground near [Edna Bristol’s] body.” *Hernandez*, 47 Cal. 3d at 328. Before arresting petitioner and searching his van, the police looked inside the van from the outside and saw “several greenish-turquoise rubberbands on the driver shifting column.” (11 RT 2859; *see also* 1 RT 69A (“[T]here was [*sic*] also several rubber bands, green and brown, on the shifting column of the vehicle.”).) The rubberbands, on their own, probably supported a finding of probable cause to search petitioner’s van, given the other facts and circumstances suggesting that the same perpetrator committed the two murders, placing petitioner with Kathy Ryn on the night of her murder and connecting petitioner to Edna Bristol about a month before Bristol’s murder.⁸ *See*,

⁸ Officer William Collette testified that the police noted many similarities between the two murders and suspected that the same perpetrator committed both crimes: (1) both victims were found in the early morning hours; (2) both victims were on grassy parkways; (3) both victims were found adjacent to schools; (4) both victims were on a non-residential side of a street, across from residential areas; (5) both victims were found in the vicinity of El Dorado Park, a park frequented by petitioner, Kathy Ryan and their other friends; (6) both victims appeared to have been murdered at a location separate from where they were found and both appeared to have been transported to the location where they were found by a vehicle or some other means; (7) there were cigarette butts at both crime scenes; (8) both victims were nude; (9) both victims were lying on their backs; (10) both victims were young Caucasians, appearing to be sixteen to twenty years of age; (11) both victims had similar physical characteristics, “that being that they had shoulder-length, long strawberry-blond hair, they were both well developed in the bust and they both appeared to be about five foot four, 125 pounds”; (12) both victims appeared to have been strangled or suffocated; (13) both victims had puncture wounds to the nipples of the breasts; (14) both victims had trauma to the mouth and facial regions; (15) the pubic hair on both victims had been burned; (16) both victims had bloody discharges from the vagina and rectum, indicating each may have been raped or sodomized; and (16) tape residue was found on the ankles and wrists of Edna Bristol, while black electrical tape was found near Kathy Ryan’s body (1 RT 284A-285A; *see also* 1 RT 292A.) In addition, the murders took place five days apart. *People v. Hernandez*, 47 Cal. 3d 315, 328 (1988). Some evidence also connected petitioner to both victims. Diva Sarzynski told an investigating officer that she was with petitioner and victim Kathy Ryan on the night leading up to Ryan’s murder. (1 RT 70A-71A.)

1 *e.g.*, *United States v. Diaz*, 491 F.3d 1074, 1078 (9th Cir. 2007) (“[P]robable cause
 2 means a fair probability that contraband or evidence of a crime will be found in a
 3 particular place, based on the totality of the circumstances.”) (internal quotation
 4 marks and citations omitted); *see also Maryland v. Pringle*, 540 U.S. 366, 370-71
 5 (2003) (“The probable-cause standard is a practical, nontechnical conception that
 6 deals with the factual and practical considerations of everyday life on which
 7 reasonable and prudent men, not legal technicians, act The probable-cause
 8 standard is incapable of precise definition or quantification into percentages
 9 because it deals with probabilities and depends on the totality of the
 10 circumstances.”) (internal quotation marks and citations and omitted); *Texas v.*
 11 *Brown*, 460 U.S. 730, 742 (1983) (“[P]robable cause is a flexible, common-sense
 12 standard A practical, nontechnical probability that incriminating evidence is
 13 involved is all that is required.”) (internal quotation marks and citation omitted).
 14 Petitioner has failed to show a reasonable probability that the evidence recovered
 15 from the van would have been suppressed, and, consequently, that petitioner
 16 would have been acquitted on any charges, had trial counsel challenged whether
 17 the police could see the color of the carpet fibers from outside petitioner’s van.

18 Accordingly, the Court DENIES Claim 5(D)(5).

19 **5. Counsel’s failure to investigate and present evidence of**
 20 **potential *Miranda* violations (Claim 5(D)(6))**

21 It is difficult to understand exactly what petitioner alleges in Claim 5(D)(6).
 22 Petitioner seems to contend that trial counsel failed to investigate and present
 23 available evidence to support petitioner’s assertion that the police delayed advising
 24 petitioner of his rights and that the police refused to honor petitioner’s request for
 25 an attorney. This evidence allegedly consists of police reports concerning
 26

27 Sarzynski also told the same investigating officer that she saw victim Edna Bristol with
 28 petitioner at El Dorado Park about a month prior to Bristol’s murder. (*Id.* at 71A-72A, 87A-
 88A.)

1 petitioner's interrogation in a separate pair of murders in San Luis Obispo County.
2 The police reports purportedly state that petitioner was not explicitly advised of his
3 rights and that the police ignored petitioner's request for counsel during
4 petitioner's interrogation for the murders in San Luis Obispo County. (The parties
5 have filed a joint stipulation that petitioner was never charged with those crimes.)
6 Petitioner alleges that the reports show that the Long Beach police and the San
7 Luis Obispo County police, in separate interrogations, similarly mistreated
8 petitioner by delaying the advisement of his rights and by not honoring his request
9 for counsel promptly. Petitioner contends that this acknowledgment "is highly
10 probative of whether Mr. Hernandez was denied his right to counsel at the time he
11 was interrogated by the Long Beach police." (Petr's 8/24/08 Brief at 24.)
12 Petitioner suggests that if counsel had discovered and presented this evidence
13 during the suppression motion, petitioner's confession would have been
14 suppressed and he would have been acquitted.

15 As stated, petitioner must show that counsel performed deficiently and that
16 this deficient performance prejudiced petitioner. *Wiggins*, 539 U.S. at 521.

17 This claim fails. Petitioner has not cited to the alleged police reports in the
18 petition or his merits briefing, and a thorough search of the records and briefs did
19 not uncover any such reports. Because the alleged police reports are unavailable
20 for the Court's inspection, the Court cannot evaluate the alleged factual
21 underpinnings of this claim. Even if such reports exist, it is difficult to imagine
22 that they contain an admission that the police violated petitioner's rights. (*See*,
23 *e.g.*, 2 RT 343A-346A, 348A-349A, 2 RT 493A-95A (detailing testimony by
24 police officers that they read petitioner his rights about ten minutes after they
25 apprehended him and that petitioner did not request an attorney). Moreover, even
26 if the Long Beach police officers advised their San Luis Obispo County
27 counterparts that petitioner "behaved similarly" when he was arrested for the Long
28 Beach murders, that fact by itself does not suggest that the Long Beach police

1 violated petitioner's rights when they interrogated him about the murders of Kathy
 2 Ryn and Edna Bristol. It is just as likely that petitioner acted similarly in the two
 3 interrogations because he was being questioned about a double murder that could
 4 lead to capital charges, as it is to presume that his behavior was related to the
 5 police failing to *Mirandize* him and or to provide counsel. Petitioner's claim of
 6 deficiency is unsupported by the record and fails as both conclusory and
 7 speculative. *Jones*, 66 F.3d at 204-05 ("It is well-settled that 'conclusory
 8 allegations which are not supported by a statement of specific facts do not warrant
 9 habeas relief.'") (quoting *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994)); *cf.*
 10 *Allison*, 431 U.S. at 75 n.7 (holding that the petition must allege facts that
 11 demonstrate the possibility of constitutional error).

12 Similarly, petitioner cannot show prejudice. Even assuming that counsel
 13 performed deficiently, petitioner would have to show that (1) absent counsel's
 14 failure to discover the police reports, which were purportedly withheld, and
 15 (2) excepting counsel's consequent failure to offer the police reports in support of
 16 the motion to suppress, the trial court would have suppressed the confession, and
 17 petitioner would have been acquitted. That possibility is too attenuated and
 18 speculative to support a finding of prejudice, particularly when the trial court held
 19 an extensive hearing on the legality of petitioner's confession. *Cooks*, 660 F.2d at
 20 740 (holding that petitioner's claim of prejudice amounted to "mere speculation").

21 Accordingly, the Court DENIES Claim 5(D)(6).

22 **6. Counsel's failure to argue to that petitioner's arraignment**
 23 **was unreasonably delayed in support of the motion to**
 24 **suppress (Claim 5(D)(8))**

25 In Claim 5(D)(8), petitioner alleges that trial counsel failed to move to
 26 suppress petitioner's February 6, 1981 confession on the grounds that his
 27 arraignment had been unreasonably delayed.

28 The Court laid out the relevant facts in its summary judgment order:

Petitioner was arrested at his residence at approximately 2:10 p.m. on February 4, 1981. He was advised of his *Miranda* rights. The advisement and petitioner's waiver were recorded on audiotape. (1 RT 307A.) The police interviewed petitioner until 8:21 p.m. that evening. During the interview, petitioner made many incriminating statements. He then agreed to provide blood, saliva and hair samples. Petitioner was taken to a hospital for that purpose. In the early morning hours of February 6, 1981, he was again interviewed by police. Before the interview, petitioner was reminded of his constitutional rights and asked if he remembered those rights. (1 RT 313A.) He agreed to provide a dental impression and was taken to the hospital for that purpose.

(Summary Judgment Order at 24.)

“[T]he Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest.” *County of Riverside v. McLaughlin*, 500 U.S. 44, 47 (1991) (citing *Gerstein v. Pugh*, 420 U.S. 103, 124 (1974)). Specifically, “a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement.” *McLaughlin*, 400 U.S. at 56; *but see McLaughlin*, 400 U.S. at 56-57 (explaining that the 48-hour rule will generally provide immunity from systematic challenges, but that it will not bar a claim where the individual can prove that despite providing a probable cause determination within 48 hours, that determination was still delayed unreasonably).

Petitioner argues that he was not arraigned within 48 hours of his arrest, as required by *McLaughlin* and California Penal Code Section 825. In fact, petitioner contends that he was not arraigned until March 4, 1981, a full month after his arrest. (Petr's 8/23/08 Brief at 26.) Petitioner therefore alleges that trial counsel was ineffective for failing to argue that the unreasonable delay in his arraignment was only for the purpose of investigation and that, therefore, petitioner's February 6, 1981 confession should have been suppressed because it was the fruit of the poisonous tree. (Petr's 8/23/08 Brief at 27.)

Petitioner must demonstrate that counsel performed deficiently and that this

1 deficient performance prejudiced petitioner. *Wiggins*, 539 U.S. at 521.

2 Petitioner cannot prevail on this claim. Petitioner cannot demonstrate that
3 counsel was deficient for failing to argue that the February 6, 1981 confession
4 should have been suppressed based on an unreasonable delay in arraignment. The
5 facts show that petitioner was arrested at about 2:10 p.m. on February 4, 1981. He
6 began to give the police a tape-recorded confession that same day at 7:38 p.m.
7 Petitioner then offered another confession in the early morning hours of February
8 6, 1981. Both of these confessions fall within the 48-hour rule, as the time for a
9 probable cause determination would not have expired until 2:10 p.m. on February
10 6, 1981. In other words, neither confession was made “past the time that the delay
11 was unreasonable.” *Cf. Anderson v. Calderon*, 232 F.3d 1053, 1071 (9th Cir.
12 2000). Therefore, counsel was not deficient for failing to argue at the suppression
13 hearing that the February 6, 1981 confession should have been suppressed because
14 there was an unreasonable delay in petitioner’s arraignment.

15 Accordingly, the Court DENIES Claim 5(D)(8).

16 **7. Counsel’s failure to challenge State’s theory that petitioner**
17 **used a baseball bat to assault victims (Claim 5(D)(10))**

18 In Claim 5(D)(10), petitioner argues that trial counsel failed to challenge the
19 State’s contention that petitioner sexually assaulted the victims with a baseball bat.

20 At trial, the State presented the testimony of Joan Dr. Shipley, a pathologist
21 who worked for the Los Angeles County medical examiner. (9 RT 1968-89.)
22 When asked whether the condition of the victims’ bodies was consistent with or
23 excluded penetration by a penis, Dr. Shipley testified that the damage to the anus
24 and vagina of both victims indicated “a very severe degree of trauma, and the
25 wounds in both girls [were] extremely similar and extremely rare.” (9 RT 2030.)
26 She also described the injuries as “very extensive,” and stated that “in ten years’
27 experience, it’s almost been unique to find it in these two cases, and it certainly
28 suggests a very large object and repetitive injuries.” (*Id.*) When asked,

1 Dr. Shipley opined that the wounds could be consistent with a baseball bat. (*Id.*)

2 The prosecution also called Barbara Johnson, a forensic serologist for the
3 Los Angeles County Sheriff's Department. (10 RT 2323-33.) Johnson testified
4 that she found human blood on the baseball bat retrieved from petitioner's van.
5 (*Id.* at 2394.) The blood "was on the side of the bat and about the middle portion
6 of the bat." (*Id.* at 2491.) She checked the rest of the bat for blood but did not
7 find any. (*Id.* at 2492.) She also examined a "white crusty stain at the end of the
8 bat" for semen but did not detect any. (*Id.*) Finally, Johnson testified that the
9 blood on the baseball bat was likely petitioner's blood. (*Id.* at 2496.)

10 Again, petitioner must show that counsel performed deficiently and that this
11 deficient performance prejudiced petitioner. *Wiggins*, 539 U.S. at 521.

12 Petitioner's claim cannot prevail. Even if trial counsel's failure to challenge
13 the prosecutor's intimation that petitioner used a baseball bat to assault both
14 victims was deficient, petitioner cannot show prejudice. Any lay person could
15 have concluded based on the evidence presented that the baseball bat was not used
16 to assault the victims. If petitioner used the baseball bat to assault the victims, one
17 would expect the bat to contain more than a small amount of blood, and that blood
18 would not be only in the center of the bat but would extend from either end of the
19 bat. Moreover, the blood found in the center of the baseball bat was petitioner's
20 blood rather than the blood of one of the victim's. A small amount of the
21 petitioner's blood in the center of the baseball bat is not consistent with the bat
22 being used to sodomize or otherwise assault the victims.

23 Accordingly, the Court DENIES Claim 5(D)(10).

24 **8. Counsel's failure to obtain all discovery (Claim 5(D)(11))**

25 In Claim 5(D)(11), petitioner contends that trial counsel failed to move to
26 discover or obtain a complete record of all the material in the possession of the
27 State, particularly all of the notes and reports made by the police and the coroner,
28 among others. Trial counsel also failed to obtain clinical notes and records of the

1 scientific tests performed by the State, as well as the conditions in which the
2 physical evidence was maintained prior to testing.

3 As with other IAC claims, petitioner must show that counsel performed
4 deficiently and that this deficient performance prejudiced petitioner. *Wiggins*, 539
5 U.S. at 521.

6 Petitioner cannot prevail on this claim because he cannot show prejudice.
7 The physical evidence helped to establish petitioner's identity as the assailant,
8 which was not an issue at trial. Petitioner confessed to the murders, and that
9 confession was admitted. Petitioner's defense at trial was not mistaken identity
10 but that he accidentally killed the victims, that he suffered from diminished
11 capacity or both. To demonstrate prejudice, petitioner would have to show that the
12 physical evidence was kept in conditions that compromised its integrity and that
13 the degraded quality of the evidence resulted in prejudice to petitioner. Petitioner
14 does not make such a claim, nor does he attempt to prove anything of the sort.
15 Trial counsel's alleged errors with respect to the physical evidence would not have
16 made a difference in the outcome at trial.

17 Petitioner does not point to evidence to show what counsel would have
18 discovered had he obtained all of the materials in the State's possession at the time
19 of trial. Perhaps petitioner means to suggest that trial counsel would have cross
20 examined the witnesses more effectively had he possessed a more complete record,
21 but such an interpretation is born in conjecture and speculation. *James v. Borg*, 24
22 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a
23 statement of specific facts do not warrant habeas relief.")

24 Accordingly, the Court DENIES Claim 5(D)(11).

25 **9. Counsel's failure to have physical evidence tested**
26 **independently (Claim 5(D)(12))**

27 In Claim 5(D)(12), petitioner alleges that trial counsel failed to obtain an
28 independent evaluation of the State's testing of the physical evidence, including

1 hair samples, saliva, blood, bite marks, vaginal swabs, and then unreasonably
2 failed to move to exclude that evidence. Petitioner contends that this error both
3 allowed the jury to rely upon false and materially misleading information and
4 prevented trial counsel from moving to exclude petitioner's confession on grounds
5 that it was unreliable and the product of impermissible interrogation tactics by the
6 police.

7 Petitioner must demonstrate both that counsel performed deficiently and that
8 this deficient performance prejudiced petitioner. *Wiggins*, 539 U.S. at 521.

9 Petitioner cannot prevail on this claim. As with Claim 5(D)(11), the
10 physical evidence corroborated petitioner's identity, but that was not an issue at
11 trial because petitioner confessed. Petitioner has not shown how trial counsel's
12 failure to conduct an independent evaluation of the physical evidence caused the
13 jury to rely upon false and materially misleading information or how this alleged
14 occurrence prejudiced him. This speculative allegation cannot support relief.
15 *Jones*, 66 F.3d at 204-05; *cf. Allison*, 431 U.S. at 75 n.7. Moreover, petitioner's
16 claim that trial counsel's failure to conduct an independent evaluation of the
17 evidence prevented trial counsel from moving to exclude petitioner's confession
18 on grounds that it was unreliable and the product of impermissible interrogation
19 tactics by the police fails. Trial counsel did move to suppress the evidence on
20 these grounds. (Partial Summary Judgment Order (Oct. 2, 1997) at 29-30
21 (granting summary judgment to respondent on portion of Claim 5(D)(14)
22 concerning trial counsel's failure to object to petitioner's confession as unreliable
23 due to coercive police tactics).)

24 Accordingly, the Court DENIES Claim 5(D)(12).

25 **10. Counsel's failure to investigate the reliability of petitioner's**
26 **statement (Claim 5(D)(15))**

27 In Claim 5(D)(15), petitioner argues that trial counsel failed to make an
28 inquiry into the reliability of petitioner's statement to the police that he placed one

1 of his victims on the cowl of the van, given the absence of corroborating
2 evidence in the pathologist's reports. Petitioner alleges that this error allowed the
3 jury to be subject to false impression testimony.

4 To prevail on this claim, petitioner must show that counsel performed
5 deficiently and that this deficient performance prejudiced petitioner. *Wiggins*, 539
6 U.S. at 521.

7 It is unclear what petitioner is alleging that counsel should have done to
8 inquire into the reliability of petitioner's statement. Petitioner's claim also
9 assumes that a tangible injury to Bristol's body would have resulted and been
10 visible if petitioner in fact placed Bristol's body on the hot cowl, which may
11 not be the case. Again, conclusory allegations do not support habeas relief.
12 *James*, 24 F.3d at 26.

13 Accordingly, the Court DENIES Claim 5(D)(15).

14 **11. Counsel's failure to adequately cross examine a State**
15 **witness (Claim 5(D)(16))**

16 In Claim 5(D)(16), petitioner alleges that trial counsel inadequately cross
17 examined a police officer called to testify for the State because trial counsel
18 elicited testimony that the police officer was a polygrapher. Petitioner has
19 withdrawn this claim. Accordingly, the Court DENIES Claim 5(D)(16).

20 **12. Counsel's failure to call Cliff Williams (Claim 5(D)(17))**

21 In Claim 5(D)(17), petitioner contends that trial counsel failed to secure the
22 presence of a critical defense witness, Cliff Williams, at trial.

23 Officer Williams was a twelve-year veteran of the Long Beach Police
24 Department who retired after being injured in the line of duty. His daughter,
25 Heidi, was engaged to petitioner at the time of the crimes. Trial counsel had
26 interviewed Officer Williams several times before trial. Officer Williams told trial
27 counsel that he liked petitioner and that petitioner had a future if he applied
28 himself. Officer Williams agreed to testify on petitioner's behalf, and trial counsel

1 told the jury in his penalty phase opening argument that he intended to call Officer
2 Williams. At some point during trial, Officer Williams expressed his concern that
3 testifying for petitioner would have an adverse impact on Officer Williams's real
4 estate business, which relied in large part on business from Long Beach police
5 officers. Thus, Officer Williams informed trial counsel that he did not want to
6 testify at trial. Although counsel had subpoenaed Officer Williams to testify three
7 times, once for each trial date, trial counsel did not put Officer Williams on the
8 stand.

9 Again, petitioner must demonstrate that counsel performed deficiently and
10 that this deficient performance prejudiced petitioner. *Wiggins*, 539 U.S. at 521.

11 Respondent argues that trial counsel made a tactical decision not to call
12 Officer Williams because he had become an unwilling character witness.
13 Petitioner counters, convincingly, that counsel's failure to call Officer Williams
14 was not tactical, citing numerous times to trial counsel's eleven-volume deposition
15 transcript. (*See, e.g.*, 9 CDD 27.) Counsel also explained how he tended to use
16 subpoenas:

17 [I]f I am sure that they are going to testify and they are going to
18 testify, good for me. Then what happens is I don't bother to subpoena
19 them because they are going to show up and they are going to testify
20 anyway and a subpoena might make them mad. That is not the
situation with a police officer.

21 A police officer may very well—and this is just my experience
22 and it may not match up with anyone else's—a police officer
sometimes has to have an excuse to testify because if he doesn't have
an excuse his fellow officers are going to get angry with him.

23 So, as a consequence what you do is you give him, no matter
24 how helpful he wants to be and it appears that he is going to be, you
put a piece of paper in his hand and say, here, you are subpoenaed and
25 then he has to testify. The other officers understand that and
generally that is good enough. That is why they tell the truth.

26 (9 CDD 48-49.) Trial counsel's failure to call Officer Williams was neither
27 strategic nor reasonable.

28 Trial counsel stated in his opening argument that he intended to call three

1 non-family character witnesses during the penalty phase: (1) Kimberly Parker, a
2 friend of petitioner's; (2) Heidi Williams Brown, petitioner's fiancée at the time of
3 the crime; and (3) Cliff Williams, Heidi's father. Trial counsel did in fact call
4 Parker and Brown. Parker testified that petitioner convinced her that she should
5 stop drinking alcohol and smoking marijuana because she had Diabetes. (14 RT
6 3608-09.) Brown testified that she had been engaged to petitioner, that they had
7 "normal" sexual relations and that the only time he displayed any type of violence
8 was when she once hit him very hard with a pipe, causing welts, and petitioner
9 slapped her in response. (14 RT 3615-16, 3618.) The evidence from both Parker
10 and Brown consumed less than fourteen pages of transcripts, including cross
11 examination. Counsel then failed to call Officer Williams, potentially his most
12 effective and credible character witness, despite telling the jury in his opening
13 statement that he intended to put Officer Williams on the stand and even though
14 Officer Williams had been subpoenaed for trial. Counsel's failure to put Officer
15 Williams on the stand was deficient.

16 Officer Williams provided the following evidentiary hearing testimony:

17
18 I knew Francis Hernandez very well when he was a young man.
19 Francis dated my daughter Heidi. Francis was a good kid, and I had a
20 favorable opinion of him. When Francis was arrested for murder, it
21 was truly a shock for all of us.

22
23 Before Francis's trial, his attorney met with me because he
24 wanted to know what I thought of Francis. I answered Francis's
25 attorney's questions truthfully, and the attorney asked me to testify on
26 Francis's behalf at his murder trial. I agreed to do so, but I later
27 changed my mind. If I had testified at Francis's trial, or at any trial, I
28 would certainly have told the truth.

(Williams 6/22/03 Decl. at 1, ¶¶ 1-2.)

25 Again, the prejudice inquiry requires the Court to assess all of the mitigating
26 evidence, both that presented at trial and as part of the evidentiary hearing, and
27 then to reweigh that evidence against the State's case in aggravation. *Williams*
(*Terry*), 529 U.S. at 398. Putting Officer Williams, an experienced police officer

1 injured in the line of duty, on the stand to testify as to petitioner's character likely
2 would have carried more weight with the jury than the very limited character
3 evidence presented. Officer Williams clearly had strong character evidence to
4 offer. His daughter had been engaged to petitioner just before the crime occurred,
5 and Officer Williams had spent a lot of time with petitioner. Despite petitioner's
6 brutal murders of other young women, Officer Williams would have testified that
7 he knew petitioner well at the time of the crime, that he had a positive opinion of
8 petitioner and that petitioner had a future if he applied himself. The positive,
9 coherent character testimony from Officer Williams would have bolstered the
10 evidence presented, particularly compared to the thin mitigation case presented.
11 Moreover, the absence of Officer Williams's testimony after trial counsel
12 specifically told the jury he was going to put Officer Williams on the stand likely
13 had a substantial negative impact on the penalty phase evidence actually presented
14 at trial.

15 Nevertheless, petitioner has not established a reasonable probability that the
16 testimony of one police officer who held a positive view of petitioner would have
17 caused the jury to vote for life instead of death. Officer Williams's testimony
18 could not overcome the brutal circumstances of the crime, coupled with
19 petitioner's callous and unfeeling penalty phase testimony.

20 Accordingly, the Court DENIES Claim 5(D)(17), but will consider
21 counsel's deficiency in the cumulative error analysis.

22 **13. Counsel's failure to object to the admission of prejudicial**
23 **character evidence (Claim 5(D)(19))**

24 In Claim 5(D)(19), petitioner argues that trial counsel failed to object
25 to the introduction of highly prejudicial character evidence that on the night of
26 Edna Bristol's murder, petitioner went looking for a homosexual to assault, found
27 one and then beat him up and robbed him. Petitioner further contends that trial
28 counsel failed to object to the prosecutor's argument based on that testimony.

1 Again, petitioner must demonstrate that counsel performed deficiently and
2 that this deficient performance prejudiced petitioner. *Wiggins*, 539 U.S. at 521.

3 The portion of the confession to which petitioner objects is the following:

4 I was driving down the street. I had just—uh—I was drunk. I
5 was in a weird mood and thinking about a lot of things and just
6 decided to go out and find—find myself a homosexual to beat up on,
7 and I just found one. I just got through robbing him for his last ten
dollars.

8 (Confession Transcript at 3.)

9 Petitioner contends that his assault of the homosexual, an uncharged
10 offense, was admitted as improper character evidence. Cal. Evid. Code §1101(a).
11 Petitioner argues that none of the exceptions, including motive, opportunity, intent,
12 preparation, plan, knowledge, identity, absence of mistake or accident, applies.
13 Cal. Evid. Code § 1101(b). Arguably, the intent and accident exceptions may
14 apply. Petitioner’s intent to rape and intent to kill were disputed material issues at
15 trial. *See People v. Robbins*, 248 Cal. Rptr. 172, 178 (1988) (citing *People v.*
16 *Kelley*, 57 Cal. Rptr. 363, 372 (1967) (“Such evidence is admissible in cases where
17 the proof of defendant’s intent is ambiguous, as when he admits the acts and
18 denies the necessary intent because of mistake or accident.”).) Petitioner said that
19 he had consensual sex with Edna Bristol but also stated that he “guessed maybe
20 [Edna] thought” that he “ha[d] her . . . forcibly.” (Confession Transcript at 5.) He
21 confessed that he covered her nose and mouth with a rag but that he “might have
22 held it there too long” and she stopped moving. (*Id.* at 6.) He thought she was
23 still alive when he left her body at Marshall Junior High. (*Id.*)

24 The admissibility of the uncharged conduct “depends on three principal
25 factors: (1) the *materiality* of the fact sought to be proved or disproved; (2) the
26 *tendency* of the uncharged crime to prove or disprove the material fact; and (3) the
27 existence of any rule or *policy* requiring the exclusion of the relevant evidence.”
28 *People v. Thompson*, 165 Cal. Rptr. 289, 294 (1980).

1 First, the evidence in question—here, petitioner’s attack on a homosexual—
2 must be material to the intent issues disputed at trial. *Robbins*, 248 Cal. Rptr. at
3 178. “To be relevant, an uncharged offense must tend logically, naturally and by
4 reasonable inference to prove the issue(s) on which it is offered.” *Id.* The
5 California Supreme Court has “long recognized that if a person acts similarly in
6 similar situations, he probably harbors the same intent in each instance, and that
7 such prior conduct may be relevant circumstantial evidence of the actor’s most
8 recent intent.” *Id.* (citation and internal quotation marks omitted). Moreover,
9 “[t]he inference to be drawn is not that the actor is *disposed* to commit such acts;
10 instead, the inference to be drawn is that, in light of the first event, the actor, at the
11 time of the second event, must have had the intent attributed to him by the
12 prosecution.” *Id.* Petitioner’s attack on the gay man, just before he picked up
13 Edna Bristol, suggests that petitioner may have been seeking out individuals he
14 perceived as vulnerable in order to take advantage of them. At this level of
15 generality, petitioner’s uncharged conduct does have some relevance to his intent
16 to rape and murder Edna Bristol later that same night.

17 However, the uncharged offense also must have a tendency to prove intent
18 or disprove accident. In short, the uncharged conduct must be “substantially
19 similar” to the charged offense. *Robbins*, 248 Cal. Rptr. at 179. The charged and
20 uncharged conduct must be fairly similar. *See, e.g., People v. Carter*, 23 Cal. Rptr.
21 2d 888, 894 (Cal. Ct. App. 1993) (finding killings substantially similar where both
22 victims were homosexual men of about the same age, both met defendant in public
23 places, both went with defendant to more secluded locations where they were
24 robbed and killed, the killings were close together in time, both victims were shot
25 in the head at close range by the same gun, both victim’s cars were ransacked and
26 left in public places, both victims were robbed of their credit cards and defendant
27 used both victim’s credit cards immediately); *People v. Delgado*, 13 Cal. Rptr. 2d
28 703, 708 (Cal. Ct. App. 1992) (finding prior uncharged conduct “sufficiently

1 similar” to prove intent where both uncharged and charged conduct involved
2 burglary of a residence through a window, and items taken as repayment for a debt
3 included a VCR in a pillowcase and stolen jewelry).

4 Here, there is insufficient “similarity in time, place and potential motive” to
5 make petitioner’s testimony that he beat up and robbed a gay man admissible to
6 prove whether petitioner intended to rape and murder Edna Bristol later that night.
7 *See People v. Curry*, 142 Cal. Rptr. 649, 651 (Cal. Ct. App. 1977). The uncharged
8 conduct does not tend to prove intent to rape or kill. On this basis alone, counsel
9 could have successfully challenged the admission of the uncharged conduct as
10 impermissible character evidence.

11 Even if the acts were substantially similar, the Court also should consider
12 any policy or rule that would require exclusion of the evidence. For example,
13 “[e]vidence may be excluded under Evidence Code Section 352 if its probative
14 value is ‘substantially outweighed by the probability that its admission would
15 create substantial danger of undue prejudice, of confusing the issues, or of
16 misleading the jury.’” *People v. Lindberg*, 45 Cal. 4th 1, 22-23 (2008) (citation and
17 internal quotation marks omitted). In addition, “[b]ecause substantial prejudice is
18 inherent in the case of uncharged offenses, such evidence is admissible only if it
19 has substantial probative value.” *Id.* (citation and internal quotation marks
20 omitted); *see also People v. Soper*, 45 Cal. 5th 759, 773 (“It is therefore
21 appropriate, when the evidence is of an *uncharged* offense, to place on *the People*
22 the burden of establishing that the evidence has *substantial* probative value that
23 clearly outweighs its inherent prejudicial effect.” (citation and internal quotation
24 marks omitted).)

25 Evidence that petitioner went out looking for a gay man to assault, found
26 one and then proceeded to assault and rob him has little materiality to the intent
27 questions at issue at trial. Specifically, petitioner’s assault and robbery of a gay
28 man has little probative value, if any, to determining whether petitioner intended to

1 rape and murder Edna Bristol a short time later. The prejudicial effect of this
2 evidence outweighs any probative value it might have. Trial counsel failed to
3 object to the admission of this evidence. His failure to do so was deficient.

4 Petitioner also alleges that trial counsel failed to object when the prosecutor
5 incorporated petitioner's assault of the gay man into his closing arguments. In the
6 guilt phase, the prosecutor used the incident to try to prove intent to rape,
7 sodomize and murder Edna Bristol.

8
9 [Y]ou can tell what his intent was, because he admits to the
10 police officers that he was angry that night, he was upset, he wanted
11 to hurt somebody; that, in fact, he picked up a homosexual, beat him
12 up, robbed him of his last five dollars or ten dollars, whatever it was.
13 He then went out looking again, and he saw Edna Bristol over here on
14 Broadway, as opposed to the homosexual on Ocean, picked her
15 up [H]e is out to hurt people. Now, you don't think rape is only
16 an act of sex. It's an act of violence. That's what occurred here. He
17 is out to hurt people. That's his intention. Okay For example: 'I
18 was driving down the street . . . I was in a weird mood and thinking
19 about a lot of things and just decided to go out and find—find myself
20 a homosexual to beat up on, and I just found one.'—indicating he is
21 angry, he is frustrated and he wants to hurt somebody.

22 (12 RT 3126, 13 RT 3187.)

23 In his penalty phase argument, the prosecutor argued that petitioner was not
24 remorseful but, rather, callous and abnormal. (14 RT 3636-38.) The prosecutor
25 read excerpts from petitioner's confession that minimized or downplayed the
26 events surrounding Edna Bristol's murder. The prosecutor then contrasted those
27 statements with other evidence that petitioner actually committed a worse or more
28 violent act. As one example of petitioner's lack of remorse, the prosecutor argued,
"He doesn't tell you that 'I went out looking for someone to beat up,' as he told
the police that night he met Edna, that he wanted to take out his frustrations on
someone to cause them pain." (14 RT 3639.) The prosecution integrated
inadmissible evidence of petitioner's attack on a gay man into its closing argument
at both the guilt and penalty phases. Trial counsel performed below the standard
of care both by failing to object to the admission of evidence about petitioner's

1 attack on the gay man and by failing to object to the prosecutor's argument relying
2 on that evidence.

3 Petitioner also must show prejudice. *Wiggins*, 539 U.S. at 521. Petitioner
4 must show a reasonable probability that but for counsel's failure to object to the
5 evidence or the prosecutor's argument about it, petitioner would have been
6 acquitted or that he would have received a life sentence. *Strickland* 466 U.S. at
7 694. Petitioner cannot show that had trial counsel successfully excluded the
8 inadmissible conduct evidence that the jury would have acquitted. Ample
9 evidence, including portions of petitioner's confession, viewed together with the
10 condition of the victim's bodies, suggested that petitioner intended to rape,
11 sodomize and kill Edna Bristol. Similarly, while the prosecutor relied in part on
12 prior conduct evidence to argue that petitioner had no remorse and deserved the
13 death penalty, the prosecutor also relied on many other pieces of evidence,
14 including petitioner's confession, the condition of the victims' bodies and
15 petitioner's penalty phase testimony. Counsel's failure to object to and exclude
16 this erroneously admitted evidence is not sufficient on its own to warrant guilt or
17 penalty phase relief.

18 Accordingly, the Court DENIES Claim 5(D)(19) but will consider counsel's
19 deficiency in the cumulative error analysis.

20 **14. Trial counsel's failure to investigate the victims (Claims**
21 **5(D)(20), 5(D)(21) & 5(D)(34))**

22 In Claim 5(D)(20), petitioner challenges trial counsel's failure to conduct
23 any investigation into the medical condition of Edna Bristol, including her level of
24 intoxication and her prior heart condition. In Claim 5(D)(34), petitioner contends
25 that trial counsel failed to investigate the condition of both victims and that had he
26 done so, he would have discovered an alternate explanation for Bristol's death that
27 corroborated petitioner's statement to police that he did not intend to kill her and
28 his belief that she was alive when he left her. In Claim 5(D)(21), petitioner argues

1 that trial counsel failed to conduct any investigation into Bristol's arrest and
2 juvenile records. Petitioner alleges that both Bristol's level of intoxication and her
3 prior criminal records would have supported petitioner's defense that he believed
4 Bristol consented to sexual intercourse.

5 As stated, petitioner must show that counsel performed deficiently and that
6 this deficient performance prejudiced petitioner. *Wiggins*, 539 U.S. at 521.

7 Petitioner cannot prevail on these claims. First, petitioner's allegations of
8 deficiency are conclusory. Petitioner fails to point to facts in the record indicating
9 what Bristol's level of intoxication was at the time of the crime, that she suffered
10 from a heart condition that or that she had an arrest or juvenile record. Petitioner
11 also fails to tie the alleged facts that counsel failed to investigate to a prejudicial
12 claim of deficiency. As pled, the Court can only speculate as to how the facts,
13 whatever they may be, show that counsel conducted an inadequate investigation.
14 Petitioner has only put forth conclusory allegations of deficiency. *James*, 24 F.3d
15 at 26; *see also Boehme v. Maxwell*, 423 F.2d 1056, 1058 (9th Cir. 1970) (holding
16 that "conclusory statements are no substitute for proper allegations of fact" and
17 that [a]llegations of fact, rather than conclusions, are required"). Without clear
18 allegations of deficiency, the Court cannot evaluate the potential prejudice to
19 petitioner. *Cooks*, 660 F.2d at 740. Moreover, the condition of Bristol's body
20 suggests that she was strangled and that she did not consent to sexual intercourse.
21 At the very least, the condition of her body may have reasonably informed
22 counsel's decision not to pursue an alternate theory of death or a defense of
23 voluntary intercourse, undercutting petitioner's claim of deficiency. Alternatively,
24 the condition of Bristol's body likely would have caused the jury to reject a claim
25 of consensual sex, substantially weakening any potential prejudice.

26 Accordingly, the Court DENIES Claims 5(D)(20), 5(D)(21) and 5(D)(34).
27
28

15. Counsel’s failure to exercise peremptories on jurors who were victims of crime (Claim 5(D)(23))

In Claim 5(D)(23), petitioner challenges trial counsel’s failure to remove several jurors who had previously been the victims of crime, despite having peremptory challenges remaining.

Again, petitioner must demonstrate that counsel performed deficiently and that this deficient performance prejudiced petitioner. *Wiggins*, 539 U.S. at 521. In order to evaluate deficiency and prejudice, the Court must consider whether any of the jurors was biased. *Davis v. Woodford*, 384 F.3d 628, 643 (9th Cir. 2003) (“Establishing *Strickland* prejudice in the context of juror selection requires a showing that, as a result of trial counsel’s failure to exercise peremptory challenges, the jury panel contained at least one juror who was biased.”).

The Sixth Amendment guarantees the accused “a fair trial by a panel of impartial, indifferent jurors.” *United States v. Eubanks*, 591 F.2d 513, 516 (quoting *Irvin v. Dowd*, 366 U.S. 717 (1961)). “The principle way in which this right to trial by ‘indifferent’ jurors is secured is through the system of challenges exercised during voir dire.” *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977). In determining whether a juror suffered from implied or presumed bias, the Court must consider whether there existed the “potential for substantial emotional involvement, adversely affecting impartiality.” *Allsup*, 566 F.2d at 71, 72 (holding that jurors who work for the same bank that was robbed in the crime underlying the trial were biased). To put it another way, the Court must evaluate whether “this is one of ‘those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances.’” *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir. 1991) (quoting *Person v. Miller*, 854 F.2d 656,664 (94th Cir. 1988)). Notably, the Ninth Circuit has “been willing to presume bias where a juror or his close relatives have been

1 personally involved in a situation involving a similar fact pattern.” *See Tinsley*,
2 895 F.3d at 528.

3 A review of the voir dire transcript with respect to six of the nine jurors
4 shows that counsel did not perform deficiently. While each of these six jurors, or
5 one of their close relatives, was a crime victim, the crimes were unrelated to
6 petitioner’s charges at trial. Accordingly, trial counsel had reason to believe that
7 the jurors would be impartial. (7 RT 1524-34 (Juror Caudel was robbed at the
8 wine wholesaler where he worked 12 years before trial); 7 RT 1604-1612 (Juror
9 Maltin was robbed at gunpoint at the grocery store where he worked more than
10 two years before trial); 7 RT 1348-1355 (Juror Prosser had a tape deck stolen out
11 of her car “a long time ago”); 7 RT 1417-25 (Juror Lamont’s grandparents’ home
12 was burglarized twice in three months about seven years prior to trial); 8 RT 1706-
13 14 (Juror McClister’s home was burglarized eight years prior to trial); 8 RT 1698-
14 04 (Juror Howard was robbed of a transistor radio as a young teenager).) Based on
15 the crimes involved and the voir dire responses, it appears that none of these six
16 jurors was biased. As to these jurors, petitioner’s claim fails.

17 The remaining three jurors present a closer question. On voir dire, Juror
18 Manchester offered that her home had been burglarized seven years prior to trial.
19 (7 RT 1466.) Her husband caught the perpetrator, and her husband also served as
20 a witness at the subsequent trial. (7 RT 1470.) In addition, when asked if there
21 were any reason she did not want to serve on this case, Juror Manchester talked
22 about how her son’s godmother was raped two months before. (7 RT 1471.) She
23 described her son’s godmother as someone to whom she was “very close” and that
24 she had “deep feelings” about the rape. (7 RT 1471, 1473.) She said that she
25 “would try the best [she] could” to be fair and impartial but that she felt doing so
26 “would be difficult.” (7 RT 1473, 1472; *see also* 7 RT 1474, 1475 (“I cannot just
27 come out and say I would not be fair, because I feel basically I am a fair person. I
28 would do the best I could to keep the cases separate . . . I cannot guarantee it.”).)

1 Juror Manchester said that she could separate the facts associated with the two
2 crimes but that her “personal involvement” was the sticking point. (7 RT 1473;
3 *see also* 17 RT 1473 (“The facts I could separate, but the feelings would be
4 difficult for me.”).) While she stated that her friend asked her to attend the trial of
5 her accused rapist, Juror Manchester also stated that she would not feel guilty if
6 she voted to acquit petitioner. (17 RT 1476.)

7 Juror Howes testified that when she was 23-years-old, a known sex offender
8 threw a boulder through her window after “trying to break in for about two
9 months.” (7 RT 1566.) He attempted to talk his way into her house while she
10 waited for the police to arrive. (7 RT 1581.) Juror Howes was a retired nurse at
11 the time of trial, so this incident took place decades before trial. In addition,
12 Juror Howes talked about the rape and murder of her son’s boss’s 12-year-old
13 daughter, an incident that took place three of four years prior to trial. (7 RT 1574.)
14 She described the relationship between her son and his boss as a friendship. (7 RT
15 1574, 1575.) She stated that she saw her son’s boss and his wife several times a
16 year, both when she had lunch with her son and at family parties. (7 RT 1575.)
17 Juror Howes stated that she thought she had put the girl’s rape and murder “out of
18 [her] mind,” but that she was afraid that she would not be able to be a fair and
19 impartial juror because the cases were “very similar.” (7 RT 1576.) She said it
20 was “all coming back now” and that it was “going to progress,” and that she was
21 afraid and unsure of how she might react. (7 RT 1577.) She also said that she felt
22 very angry at and hostile toward the person who raped and murdered the 12-year-
23 old girl. (7 RT 1577.) When asked, she stated that she would be uncomfortable
24 having herself as a juror, given the circumstances. (7 RT 1579.) On the other
25 hand, Juror Howes also stated that she could try to decide the case based only on
26 the facts presented but that she was “just a little concerned about it.” (7 RT 1577,
27 1580.) She also stated that her feelings about the 12-year-old girl being murdered
28 were “[t]he same” as the reaction she would have to seeing on television that a 23-

1 year-old stranger had been raped and murdered and that she did not blame
2 petitioner for what happened to the daughter of her son's boss. (7 RT 1585, 1586.)
3 Juror Howes said that she thought she could listen to the evidence and decide the
4 case accordingly. (7 RT 1588.)

5 When asked if there was any reason she could not serve, Juror Wagner
6 stated that "[w]e have had one experience with my son and his friend a year ago,
7 but you or someone might think it would prejudice me, but I think I can be very
8 fair in spite of it having happened." (6 RT 1242.) She then described how about a
9 year before trial, her son and his then-girlfriend (now fiancée) were approached by
10 two men at the beach. (6 RT 1242.) The men asked for matches, which her son
11 provided. (6 RT 1242.) The men then pulled a gun and attempted to rape Juror
12 Wagner's future daughter-in-law. (6 RT 1242.) Juror Wagner stated several times
13 that she could set aside that incident and still be fair and impartial (6 RT 1243.)

14 The Ninth Circuit's analysis in *Fields v. Brown* forecloses petitioner's
15 claim. In that case, a juror named Floyd Hilliard disclosed during voir dire that his
16 wife had been kidnapped, beaten, assaulted and robbed. Hilliard meant the word
17 "assaulted" to mean that his wife had been raped, but he testified at an evidentiary
18 hearing that people were not as open about sexual assault at the time of his jury
19 service as they were at the time of the evidentiary hearing. Had he been asked for
20 more detail about the crime, he would have explained that she had been raped. An
21 en banc panel denied petitioner's claim that implied or presumed bias could be
22 attributed to Hilliard, even though the petitioner had been tried for robbery, rape
23 and murder. *Fields v. Brown*, 503 F.3d 775, 773 (9th Cir. 2007) (en banc). The
24 Court held that while it had recognized that "bias may be implied where close
25 relatives of a juror 'have been personally involved in a situation involving a
26 similar fact pattern,'" the Circuit had "never done so when the juror was honest on
27 voir dire" and "declined to do so" in *Fields*. *Fields*, 503 F.3d at 773 (citing
28 *Tinsley*, 895 F.2d at 528; *Eubanks*, 591 F.2d at 517; *Dyer* 151 F.3d 970, 982 (9th

1 Cir. 1998 (en banc)). The Court explained that the juror's "honest disclosure on
2 voir dire about what happened to his wife was more than sufficient for follow-up
3 that would have fleshed out whether the relationship between his wife's experience
4 and some of the crimes charged was such that it is highly unlikely that the average
5 person could remain impartial in his deliberations." *Fields*, 503 F.3d at 773
6 (internal quotation marks and citation omitted). The Court provided the following
7 helpful passage:

8 [W]e see no basis for implying bias as a matter of law solely because
9 Hilliard was the spouse of a rape victim. As a practical matter, many
10 prospective jurors have close family members or friends who have
11 suffered similar encounters. It is the role of voir dire to ferret out
12 such relationships, and to develop the extent to which the juror's
13 ability to be impartial in the particular case is actually, or
14 presumptively, affected. For those revelations that occur during voir
15 dire, the remedy is a cause challenge Being the spouse of a rape
16 victim is not, in and of itself, such an 'extreme' or 'extraordinary'
17 situation that it should automatically disqualify one from serving on a
18 jury in a case that involves rape. It cannot be said that the average
19 person in Hilliard's position would be highly unlikely to remain impartial
whether he acknowledged it or not. Rather, the effect of the spouse's
experience on the juror's impartiality depends on purely personal
considerations that can vary from cases to case, including, for
example, the similarity of the spouse's experience to the facts of the
case, the nature of the experience, its contemporaneous and
continuing impact, the couple's relationship, how the individual
handles it, and so forth. Given Hilliard's honest response on voir dire
that revealed a potentially disqualifying relationship, but not an
extreme or extraordinary one . . . we see no basis for inferring bias
now as a matter of law.

20 *Fields*, 503 F.3d at 774-75. As in *Fields*, Jurors Manchester, Howes and Wagner
21 each admitted on voir dire that someone with whom they had a personal
22 relationship had been the victim of rape or attempted rape. They each brought up
23 the issue on their own, and both trial counsel and the prosecutor had the
24 opportunity to question the jurors about the incidents. Moreover, the rape or
25 attempted rape victims were not close relatives of the jurors. The closest
26 relationship was that of Juror Wagner to her son's fiancée. While Juror
27 Manchester described her friendship with her son's godmother as close, they were
28 not relatives. Juror Howes had concerns about the rape of her son's boss's

1 daughter. Even if her son and his boss were very close friends, Juror Howes was
 2 not a very close friend of the victim's parents. Given the spontaneous honesty of
 3 the jurors, counsel had the opportunity to elicit questions on voir dire that would
 4 demonstrate actual or implied bias. Like *Fields*, the fact that a person in each of
 5 the juror's lives had been the victim of rape or attempted rape is not enough, by
 6 itself, to support a finding of implied bias. Petitioner has not shown that any of the
 7 jurors has an extreme or extraordinary disqualifying relationship. *See Fields*, 503
 8 F.3d at 775. Because petitioner has failed to establish that Jurors Manchester,
 9 Howes or Wagner were biased, petitioner cannot prevail on this claim. "The
 10 impartiality of the jury was not undermined by [Jurors Manchester, Howes and
 11 Wagner] being seated as . . . juror[s]. Replacement of one unbiased juror with
 12 another unbiased juror should not alter the outcome." *Fields*, 503 F.3d at 776.

13 Accordingly, the Court DENIES Claim 5(D)(23).

14 **16. Counsel's failure to conduct adequate discovery (Claim**
 15 **5(D)(33))**

16 In Claim 5(D)(33), petitioner claims that counsel failed to conduct adequate
 17 discovery, resulting in counsel failing to locate or identify exculpatory evidence.

18 Petitioner must demonstrate that counsel performed deficiently and that this
 19 deficient performance prejudiced petitioner. *Wiggins*, 539 U.S. at 521.

20 Petitioner cannot prevail on this vague and conclusory claim. He fails to
 21 allege how counsel's discovery was inadequate and presumes that whatever
 22 discovery counsel should have conducted would have led to the allegedly
 23 exculpatory evidence. Moreover, petitioner fails to specify what kind of
 24 exculpatory evidence counsel failed to locate. He states only that it "includ[ed]
 25 statements made to the state's polygrapher by witnesses and other information
 26 relevant to their credibility. (Pet. at 52.) Petitioner does not provide the source or
 27 content of these statements. "Conclusory allegations which are not supported by a
 28 statement of specific facts do not warrant habeas relief." *James v. Borg*, 24 F.3d

1 20, 26 (9th Cir. 1994).

2 Accordingly, the Court DENIES Claim 5(D)(33).

3 **17. Counsel's failure to investigate the people with the victims**
4 **before their deaths (Claim 5(D)(35))**

5 In Claim 5(D)(35), petitioner contends that trial counsel failed to locate the
6 individuals who were with the victims before their deaths, arguing that those
7 people could have caused the injuries to the victims, or that they could have been
8 the source of the bodily fluids found in, on or near the victims. In addition,
9 petitioner argues that trial counsel failed to seek independent testing of the
10 physical evidence used to establish the elements of the charged offenses.

11 Petitioner must demonstrate that counsel performed deficiently and that this
12 deficient performance prejudiced petitioner. *Wiggins*, 539 U.S. at 521.

13 Petitioner likely cannot show deficiency or prejudice. In the case of Kathy
14 Ryan, the evidence presented at trial documented that Ryan and petitioner were
15 with a group of friends who played pool and drank beer at Big John's Pizza Parlor.
16 The evidence also showed that Ryan and petitioner left the restaurant at the same
17 time and got in a car with some other friends. The group dropped petitioner off at
18 a liquor store where he had parked his van and then dropped off Ryan at her home.
19 According to petitioner's confession, petitioner then picked up Ryan at her home.
20 She was found dead hours later. Some of the people with Ryan before her death
21 testified at trial about the events leading up to her death. No evidence was
22 presented at trial about Bristol's whereabouts before petitioner picked her up while
23 she was hitchhiking.

24 The jury heard evidence about who was with Ryan before she died.
25 However, petitioner has not pointed to any record evidence to show that one of
26 those individuals, or perhaps another person, was the source of the bodily fluids
27 found in, on or near Ryan, or that any other person killed her. Nor has petitioner
28 pointed to evidence to show that anyone besides petitioner was with Bristol before

1 she died. Petitioner has failed to point to evidence that would support a theory that
2 someone else injured the victims, killed them or both.

3 Moreover, petitioner argues that trial counsel should have had the physical
4 evidence tested independently. Again, however, petitioner fails to allege what
5 such independent testing would have uncovered.

6 Petitioner's unsubstantiated allegations are vague, conclusory and
7 speculative. Despite the suggestion otherwise in petitioner's brief, he must point
8 to specific allegations and the resulting prejudice to prevail on this claim. He has
9 failed to do so. *See, e.g., Jones* 66 F.3d at 204-05 (holding that relief is
10 unwarranted on the basis of conclusory allegations and without specific allegations
11 of fact); *cf. Allison*, 431 U.S. 63, 75 n.7 (1977) ("[T]he petition is expected to state
12 facts that point to a real possibility of constitutional error.") (citation and internal
13 quotation marks omitted); *see also Borg*, 24 F.3d at 26; *Boehme v. Maxwell*, 423
14 F.2d 1056, 1058 (9th Cir. 1970) (holding that "conclusory statements are no
15 substitute for proper allegations of fact" and that [a]llegations of fact, rather than
16 conclusions, are required"); *see also Cooks*, 660 F.2d at 740 (denying relief
17 because petitioner's claim of prejudice was speculative).

18 Accordingly, the Court DENIES Claim 5(D)(35).

19 **18. Counsel's failure to inform the court that his funding**
20 **request included sensitive information (Claim 5(D)(37))**

21 In Claim 5(D)(37), petitioner alleges that counsel failed to inform the trial
22 court that his ex parte requests for funding violated California Penal Code Section
23 987.9. This error resulted in the prosecution being able to obtain information
24 about petitioner's strategy and potential witnesses, including petitioner's
25 statements to an expert witness. In addition, petitioner argues that trial counsel
26 failed to take any action to correct the violation of petitioner's Fifth and Sixth
27 Amendment rights, and also failed to request a hearing to ascertain the magnitude
28 of the violations or to seek an appropriate remedy.

1 Petitioner must demonstrate that counsel performed deficiently and that this
2 deficient performance prejudiced petitioner. *Wiggins*, 539 U.S. at 521.

3 Petitioner cannot prevail on this claim, as he can show neither deficiency
4 nor prejudice. Petitioner failed to provide record citations to the funding
5 application or applications in question. The Clerk's Transcripts include a
6 document entitled "Reimbursement Cost Estimate Affidavit for Investigations,
7 Experts and Others (987.9 PC)." (1 CT 174, 175.) Petitioner claims that
8 Dr. Davis's pre-trial report was attached to the application, but it is not attached to
9 the version contained in the Court's copy of the Clerk's Transcript. In fact, the
10 application has very minimal information. The request is dated July 10, 1981, but
11 signed July 22, 1981. It includes a request for overtime as well as out-of-county
12 travel. In addition, it requests funding for a psychiatrist, a psychologist and a
13 neurosurgeon. The funding is requested for the investigation and preparation of
14 psychological defenses and for the penalty phase. (1 CT 174.) Petitioner cannot
15 show deficiency for a host of reasons. First, it is not at all clear that this document
16 is the one about which petitioner complains. If another document is relevant,
17 petitioner has failed to point to that document in the record. Second, it is not clear
18 on the face of the document that it was filed at all, let alone under seal. Petitioner
19 bears the burden of establishing that counsel performed deficiently and has failed
20 to do so here. *Strickland*, 466 U.S. at 688 ("When a convicted defendant
21 complains of the ineffectiveness of counsel's assistance, the defendant must show
22 that counsel's representation fell below an objective standard of reasonableness.").

23 Even if the Court were to presume a finding a deficiency, petitioner cannot
24 show prejudice. Petitioner has shown neither the information the prosecution
25 gained access to through the funding application, nor the way in which the State
26 used that information to its advantage.

27 Accordingly, the Court DENIES Claim 5(D)(37).
28

1 **19. Counsel's failure to prepare for trial due to alcoholism**
2 **(Claim 5(D)(38))**

3 In Claim 5(D)(38), petitioner argues that trial counsel failed to prepare for
4 trial because he was suffering from alcoholism in the months before trial.
5 Petitioner adds that counsel's alcoholism impaired his ability to objectively
6 evaluate the force of Dr. Rayyes' testimony and the need for further investigation.

7 Petitioner must demonstrate that counsel performed deficiently and that this
8 deficient performance prejudiced petitioner. *Wiggins*, 539 U.S. at 521.

9 This claim fails. The fact that trial counsel was suffering from alcoholism at
10 the time of trial is not relevant to the objective inquiry of whether counsel's
11 performance was reasonable. *Bonin v. Calderon*, 59 F.3d 815, 838 (9th Cir. 1995).
12 The Court need not "inquire into the source of [trial counsel's] alleged
13 shortcomings." *Id.* The Court granted summary judgment to respondent on Claim
14 5(A), which similarly asserted that trial counsel's affliction with esophageal cancer
15 at the time of trial deprived petitioner of his right to constitutionally adequate
16 counsel. Petitioner contended that counsel underwent surgery in the months
17 preceding trial, which left him unable to read, write or fully concentrate and that
18 the chemotherapy treatments he received throughout trial caused trial counsel to
19 suffer nausea, retching, vomiting, gastrointestinal disorders, hair loss and fatigue
20 so severe that he had to sleep during the noon recess. (Summary Judgment Order
21 at 17.) The Court concluded that "[p]etitioner's claim of IAC will stand or fall
22 based on whether counsel provided deficient performance and whether petitioner
23 suffered prejudice from the alleged deficiencies . . . [, but] petitioner cannot obtain
24 relief merely because his attorney was ill during the trial." (Summary Judgment
25 Order at 19.) The same is true with respect to Claim 5(D)(38). The fact that trial
26 counsel suffered from alcoholism at the time of trial cannot support relief on its
27 own.

28 Petitioner also complains, however, that counsel's alcoholism impacted

1 counsel's "ability to objectively evaluate the force of Dr. Rayyes' testimony and
2 the need for further investigation." (Pet. at 54.) It is difficult to determine what
3 petitioner contends here. The most charitable reading of the claim is as follows:
4 Dr. Rayyes was a gastroenterologist who specialized in treating alcoholics and
5 who had treated trial counsel and his wife, both recovering alcoholics. Perhaps
6 petitioner means to contend that because Dr. Rayyes had been intimately involved
7 in trial counsel's life, trial counsel overvalued Dr. Rayyes and relied on
8 Dr. Rayyes's testimony to petitioner's detriment when trial counsel really should
9 have conducted further investigation and hired an alternate or more qualified
10 expert.

11 Dr. Rayyes testified at trial that he was a gastroenterologist who specialized
12 in the diagnosis and treatment of alcoholism and other drug addictions. (12 RT
13 3055.) He also testified that he had authored five or six articles "in the general
14 area of alcoholism with a particular view of the medical complications and
15 behavior complications." (12 RT 3056.) Dr. Rayyes offered testimony that
16 petitioner was an alcoholic. (12 RT 3058.) Dr. Rayyes based this opinion on his
17 in-person evaluation of petitioner. He also testified that, considering the amount
18 of alcohol and marijuana petitioner consumed on the night of both crimes,
19 petitioner would be severely impaired and, accordingly, unable to form the specific
20 intent to kill. (12 RT 3069, 3070.)

21 While there may be questions about whether a gastroenterologist is the most
22 qualified person to testify about alcoholism and its effects, including whether an
23 alcoholic who has been drinking can form the specific intent to kill, the
24 prosecution did not challenge Dr. Rayyes's credibility or qualifications to evaluate
25 petitioner and to offer the opinions he gave at trial. Taken at face value, it does not
26 appear that trial counsel miscalculated the potential force of Dr. Rayyes's
27 testimony or that he should have conducted further investigation into another
28 expert. Dr. Rayyes offered testimony that petitioner was an alcoholic, that he

1 would have been severely impaired at the time of both crimes and that,
2 accordingly, he could not form the specific intent to commit the crimes. Counsel's
3 decision to put Dr. Rayyes on the stand rather than another expert does not seem
4 so objectively unreasonable that it would warrant a finding of deficiency. In other
5 words, counsel's decision to use Dr. Rayyes as an expert on alcoholism did not fall
6 below an objective standard of care. *Strickland*, 466 U.S. at 688.

7 Accordingly, the Court DENIES Claim 5(D)(38).

8 **20. Additional claims of IAC (Claim 5(D)(39))**

9 In Claim 5(D)(39), petitioner contends that trial counsel committed
10 additional acts or omissions that resulted in prejudice to petitioner.

11 First, petitioner alleges that trial counsel failed to put Laura Kostiuk, a
12 friend of victim Kathy Ryan's, on the stand. Kostiuk told counsel that Ryan had
13 sexual relations with petitioner in the past. Counsel testified that Kostiuk "would
14 have been a great witness because the issue was whether or not Francis had
15 voluntary or involuntary sexual intercourse with Kathy. Same thing was also true
16 of the other decedent, but Kathy was the big one. It was one that I could do a lot
17 with and didn't." (10 CDD 38.) Trial counsel subpoenaed Kostiuk for the original
18 trial date but did not subpoena her for the actual trial.

19 Counsel was not deficient. Even if counsel put Kostiuk on the stand, the
20 jury could have concluded that petitioner raped Ryan based on the condition of her
21 body. Moreover, a finding of consensual sex with Ryan would not have negated
22 the rape as to Bristol. Counsel was not deficient, and petitioner suffered no
23 prejudice. *See Rupe*, 93 F.3d at 1445; *see also. Roe v. Flores-Ortega*, 528 U.S.
24 470, 485 (2000) (holding that "the failure to take futile action can never be
25 deficient performance); *cf Miller v. Keeney*, 882 F.2d 1428, 1434-35 (9th Cir.
26 1989) (noting that a petitioner who challenges a futile objection fails both
27 *Strickland* prongs).

28 Petitioner also asserts that trial counsel failed to present evidence he knew

1 about the circumstances of petitioner's life just before the crimes. An investigator
2 submitted a report to counsel that stated: "These interviews provide some insight
3 as to why Hernandez might have been prompted to begin killing when he did. An
4 unstable personality coupled with rejection of his parental figures, the Williams,
5 and the final rejection of Heidi Williams, his future wife, just overloaded the
6 thought process." (10 CDD P00331 (Ex. 28).) Counsel should have been aware,
7 therefore, that petitioner was under incredible stress at the time of the crime. Trial
8 counsel conducted no further investigation into petitioner's situation, and he
9 apparently did not inform his experts about the circumstance of petitioner's life.

10 As Dr. Clausen summarized in the social history she prepared for petitioner,
11 from April 1980 until his arrest for the underlying crimes in 1981, petitioner:

12 was an eighteen-year-old, unemployed, parolee who was homeless,
13 isolated from his family, drug addicted and living in a van. Other
14 than an uncertain relationship with a girlfriend and the continued
15 association with a homeless, drug abusing friend, Francis had little
16 social support or contact. He no longer shared a home with either of
17 his parents. He was not in school. He was not incarcerated. He was
18 not in any of the various forms of treatment that teachers, social
workers, and mental health professionals had been urging for him
since he was a toddler Francis was a young man with insufficient
social and psychological resources attempting to grapple with
unmanageable stressors.

19 (Clausen Decl. at 86, ¶ 217.) Counsel did not make an informed decision to forgo
20 putting on this sort of evidence, as he mistakenly believed that petitioner was still
21 in a relationship with Heidi at the time of the crimes. (10 CDD 44-46.) Counsel's
22 failure to investigate and present the circumstances of petitioner's life, and to
23 inform his experts about those circumstances, was deficient. Expert testimony
24 about the stress petitioner was experiencing at the time of the crimes and how
25 those stresses may have affected his conduct would certainly have been helpful to
26 the jury. In addition to possibly evoking sympathy, it also would offer an
27 explanation for the murders: Petitioner, who already suffered from emotional
28 instability, felt unable to cope with the intense abandonment he felt and was

1 stressed to his breaking point. This kind of testimony may have caused the jury to
2 come to a different verdict. *See, e.g., Caro*, 280 F.3d at 1258 (finding prejudicial
3 the exclusion of expert testimony that would have reduced petitioner's moral
4 culpability). While a prejudicial omission, the excluded testimony is not sufficient
5 on its own to undermine confidence in the penalty phase verdict, given the brutal
6 circumstances of the crime and petitioner's penalty phase testimony.

7 Accordingly, the Court DENIES Claim 5(D)(39) but will consider counsel's
8 deficiency in the cumulative error analysis.

9 **21. Cumulative error (Claim 5(D)(40))**

10 In Claim 5(D)(40), petitioner alleges cumulative error from counsel's many
11 instances of deficient performance.

12 **a. Guilt phase**

13 The Court has found many deficiencies in counsel's performance at the
14 guilt phase. Counsel failed to realize that a diminished capacity defense due to
15 petitioner's mental condition was available, and he failed to investigate and
16 present that defense. Counsel also failed to investigate petitioner's biological
17 family, and such an investigation would have alerted petitioner's experts to the
18 circumstances of petitioner's prenatal development and birth, as well as the
19 prevalence of mental illness in petitioner's biological family. Information about
20 petitioner's biological family could have changed the outcome of petitioner's
21 psychological evaluations, lending additional support to a diminished capacity
22 defense. Moreover, counsel failed to investigate and present evidence about the
23 dysfunctional home in which petitioner was raised, which also would have helped
24 explain petitioner's psychological problems and, consequently, supported a
25 diminished capacity defense at guilt. Along the same lines, counsel failed to
26 investigate or present evidence about petitioner's neurological deficits and mental
27 impairments. Evidence that petitioner suffered brain damage also would have
28 buttressed a claim of diminished capacity at the guilt phase. Counsel did not retain

1 a social historian or otherwise gather the information necessary to create a social
2 history for petitioner. Furthermore, trial counsel failed to present the jury with
3 evidence about the stressful circumstances at play in petitioner's life right before
4 the crimes took place. Finally, counsel failed to object to the admission of
5 evidence that petitioner wanted to find a homosexual to beat up and rob on the
6 night of Edna Bristol's murder, and he further failed to object to the prosecutor's
7 argument about that act.

8 Counsel's performance at the guilt phase resulted in many errors and
9 omissions. While counsel did present evidence in support of a diminished capacity
10 defense based on intoxication, he failed to pursue the best possible defense at guilt:
11 that due to mental deficiency, neurological deficits and inadequate parenting,
12 petitioner lacked the capacity to form the specific intent to rape and kill his
13 victims. Counsel testified that he spent the bulk of his time preparing for the guilt
14 phase, a surprising approach given petitioner's confession and the circumstantial
15 evidence implicating petitioner. (*See* 1 CDD 11.) Although counsel chose to
16 focus the majority of his energy on the guilt phase, counsel inexplicably failed to
17 conduct an adequate investigation, to provide his experts with relevant information
18 and to prevent the jury from hearing prejudicial character evidence that made
19 petitioner seem cruel and unfeeling. These mistakes were certainly harmful.
20 Despite these many errors, however, petitioner has not shown the probability of a
21 different outcome at the guilt phase. Petitioner's confession still would have been
22 admitted, even without counsel's various deficiencies. Evidence of petitioner's
23 diminished capacity due to mental condition likely would have been insufficient to
24 overcome the confession. The jury rejected a diminished capacity defense based
25 on intoxication. Moreover, the jurors may have been aware that the electorate had
26 voted to eliminate the defense of diminished capacity due to mental defect
27 eighteen months before trial. The publicity concerning that referendum may have
28 created an environment inhospitable to a diminished capacity defense based on

1 mental condition. Petitioner's cumulative IAC claim based on counsel's guilt
2 phase performance fails.

3 **b. Penalty phase**

4 Petitioner also alleges cumulative IAC based on counsel's performance at
5 the penalty phase. Counsel performed deficiently at the penalty phase in the
6 following ways: by failing to investigate and present evidence about petitioner's
7 biological family; failing to investigate and present evidence about the
8 dysfunctional nature of petitioner's adopted family; failing to present evidence of
9 petitioner's mental condition known to counsel at the time of trial; failing to
10 question experts about documents in counsel's possession, such as adoption,
11 Montessori and counseling records from petitioner's childhood that trial counsel
12 had prepared as exhibits for trial; failing to investigate and present evidence of
13 petitioner's neurological and mental impairment; failing to retain a social historian
14 or to otherwise gather the information necessary to putting together petitioner's
15 social history; putting petitioner on the stand at penalty, but asking him only about
16 the circumstances of the crime and failing to put on expert testimony to explain his
17 cool affect; failing to call Officer Williams to testify as a character witness; failing
18 to object to evidence that petitioner wanted to find and did find a homosexual to
19 beat up and rob on the night of Edna Bristol's murder and failing to object to the
20 prosecutor's argument about that event; and failing to present evidence about the
21 stressful and chaotic circumstances in petitioner's life at the time of the crimes.
22 Counsel testified that these decisions were not strategic.

23 Counsel also testified that petitioner's trial was his first death penalty trial.
24 He was "out of [his] element and did not know what [he] was supposed to do for
25 the penalty phase." (1 CDD 11.) Counsel explained that "Judge Mullendore
26 agreed at the beginning of the trial to give me a few days between the guilt verdict
27 and the beginning of the penalty phase to get my case together." (*Id.*) Those days
28 were not enough. Counsel's omissions "clearly demonstrate that trial counsel did

1 not fulfill [his] obligation to conduct a thorough investigation of [petitioner's]
2 background. *Williams (Terry)*, 529 U.S. at 396 (quoting 1 ABA Standards for
3 Criminal Justice 4-4.1, cmt, p. 4-55 (2d ed. 1980)). The evidence presented at the
4 penalty phase was incoherent, jumbled and woefully incomplete. The jury did not
5 hear any evidence about petitioner's unfortunate beginning. The jury did not
6 know that petitioner was conceived by a 14-year-old girl who used drugs and
7 alcohol habitually during her pregnancy. Nor did the jury learn that petitioner's
8 birth father was an unemployed, incarcerated 18-year-old who beat the mother of
9 his baby while she carried petitioner. The jury did not learn that petitioner's
10 biological parents and extended families suffered from many serious mental
11 illnesses. The jurors did not know that petitioner was born with forceps, long
12 known to cause neurological damage. Neither the jury nor petitioner's
13 psychological experts knew any of this information.

14 While counsel put on testimony that petitioner's adoptive mother, Naomi,
15 suffered from schizophrenia, the jury did not hear any testimony about the effect
16 that Naomi's severe mentally disability had on petitioner as an infant, child and
17 adolescent. The jury did not hear evidence about the abuse petitioner endured,
18 including his mother sitting on him to calm him down, tying him up as a form of
19 play and administering enemas as a way to cleanse him and keep him calm. The
20 jury did not hear about how petitioner's father encouraged petitioner to engage in
21 age-inappropriate behavior, such as boxing and turning off a circuit breaker at age
22 five, backing a car out of the driveway at age eight and driving a motorcycle,
23 without a license, at age fifteen. Petitioner was involved in numerous accidents
24 from a young age, many involving head injuries. Petitioner was largely neglected
25 or ignored and was basically on his own from a young age. The jury did not hear
26 this evidence.

27 Counsel had, in his possession, evidence that petitioner suffered from
28 serious psychological problems based on Dr. Maloney's pre-trial evaluation of

1 petitioner. Counsel did not elicit this testimony during trial. Counsel prepared
2 various exhibits for trial, including petitioner's records from the Montessori school
3 he attended as a youngster, the records from the Hernandez family's attempt to
4 adopt a second child and the records from the St. Thomas More Clinic, where
5 petitioner had a psychological evaluation at age five. These records showed that
6 petitioner exhibited signs of mental illness and neurological damage as young
7 child. The jury did not hear any of this evidence.

8 In addition to the documentary clues that petitioner suffered from mental
9 illness since childhood, Dr. Maloney told counsel that petitioner was psychotic at
10 one time. Dr. Girsh told counsel that there might be a neurological or organic
11 basis for petitioner's behavior and that petitioner had dyslexia. Counsel knew that
12 petitioner started using alcohol and drugs in elementary school, and that he became
13 a heavy user of mind-altering substances in his teen years. Torelli's file shows that
14 Torelli planned to consult a psychiatrist and neurosurgeon. (1 CT 174.)
15 Moreover, as discussed, counsel did not know, but should have known, that
16 petitioner was subjected to drugs, alcohol and violence in utero, and that he was
17 delivered with the help of forceps. Counsel did not arrange for a neurological
18 examination of petitioner, which would have shown that petitioner suffers from
19 brain damage. This brain damage impairs petitioner's ability to perceive emotion
20 accurately and to give an appropriate emotional response. Expert testimony
21 explaining these problems could have mitigated petitioner's perceived culpability.

22 Counsel did not retain a social historian, nor did he take other steps to gather
23 the information necessary to create a social history for petitioner. Because of
24 counsel's failures, the jury did not get an accurate sense of petitioner's life.

25 Trial counsel put petitioner on the stand at the penalty phase. Counsel
26 proceeded to ask petitioner only about the circumstances of the crime, rather than
27 about his background or upbringing. Petitioner testified that he could not
28 remember many details of the crimes, though he had confessed to them. On cross-

1 examination, the prosecutor impeached petitioner with his confession, noting the
2 many ways in which petitioner's penalty phase testimony seemed false or self-
3 serving. To make matters worse, counsel's inadequate investigation did not allow
4 petitioner's mental health experts to offer testimony that would explain petitioner's
5 bizarre affect as he testified. Had counsel conducted an adequate investigation,
6 petitioner's experts would have had information about petitioner's biological
7 family and his dysfunctional home life, and petitioner would have had a
8 neurological examination. This additional information would have allowed an
9 expert to explain why petitioner may have been unable to perceive his victims'
10 fear or anger accurately and why he could not react appropriately during the
11 crimes. With adequate investigation and a neurological exam, petitioner also
12 could have offered testimony that petitioner had a history of dissociating, which
13 was a coping mechanism he adopted in childhood. An expert could have testified
14 that petitioner likely dissociated during the crimes. This fact would have
15 explained why his confession appeared so detailed but why he could not remember
16 many things when he testified at the penalty phase.

17 Counsel also failed to call Officer Williams to testify, despite subpoenaing
18 him for trial. Officer Williams, a former police officer injured in the line of duty,
19 would have testified that he knew petitioner well, approved of petitioner's
20 relationship with Officer Williams's daughter and thought petitioner had a future if
21 he applied himself.

22 Counsel also failed to object to testimony and related argument regarding
23 petitioner's statements in his confession that he went out looking for a homosexual
24 to rob and beat up before Edna Bristol's murder. This testimony tended to show
25 that petitioner was a violent bully, preying on vulnerable people without any
26 empathy for their defenseless position. This impermissible character evidence
27 only served to make petitioner seem like a callous monster.

28 Finally, counsel failed to put on evidence, in his possession, that petitioner

1 was experiencing an incredible amount of stress in the weeks leading up to his
2 crimes. Petitioner was eighteen, unemployed and on parole from the California
3 Youth Authority. His father had sold the family home to move in with his
4 girlfriend and gave petitioner a van to live in. Petitioner was forced to give up his
5 dog because the dog could not live in his van. Petitioner's fiancée miscarried and
6 then broke up with petitioner. Shortly afterwards, his fiancée's parents broke off
7 contact with petitioner. Petitioner was abusing drugs and alcohol regularly. His
8 only consistent social support was a friend who was homeless and drug-addicted.
9 Petitioner did not have regular contact with his parents. He was not enrolled in
10 school. He did not have the structure of a job or incarceration. He was a young
11 adult suffering from brain damage and bipolar disorder with inadequate resources
12 to cope with the incredible stress in his life.

13 The jury did not hear any of this evidence. "Instead, the jurors . . . saw only
14 glimmers of [petitioner's] history, and received no evidence about its significance
15 vis-a-vis mitigating circumstances. *Ainsworth*, 268 F.3d at 874 (internal quotation
16 marks omitted). As in *Rompilla*, the mitigating evidence that could have been
17 presented "bears no relation to the few naked pleas for mercy actually put before
18 the jury." *Rompilla*, 545 U.S. at 393. "[T]he undiscovered mitigating evidence,
19 taken as a whole, might well have influenced the jury's appraisal of [petitioner's]
20 culpability." *Id.* (internal quotation marks omitted).

21 Counsel failed to present a compelling narrative of petitioner's life. With
22 adequate investigation and preparation, counsel could have told a story of genetic
23 vulnerability, exacerbating environmental factors, child neglect, sexual abuse that
24 bore a strong relationship to the crimes and the many negative effects of being
25 raised by a severely mentally ill mother and an oblivious, unequipped father.
26 Petitioner's biological mother gave him up so that he could have a chance, but
27 petitioner was adopted into a horrible situation. His adoptive parents failed him.
28 Despite awareness by various institutions that petitioner was a troubled, unwell

1 child, he remained in the care of his abusive, inadequate parents. Petitioner had
2 little to no chance to develop into a normal, well-adjusted young man. “It goes
3 without saying that the undiscovered mitigating evidence, taken as a whole, might
4 well have influenced the jury’s appraisal of [petitioner’s] culpability, and the
5 likelihood of a different result if the evidence had gone in is sufficient to
6 undermine confidence in the outcome actually reached at sentencing.” *Rompilla v.*
7 *Beard*, 545 U.S. at 393 (internal quotation marks omitted); *compare Pinholster*,
8 131 S.Ct. at 1408-10 (denying petition where prosecution presented extensive
9 aggravating evidence, mother provided detailed testimony about petitioner’s bad
10 childhood at trial and the habeas proceedings revealed little additional evidence
11 that was either mitigating or not cumulative).

12 The cumulative effect of trial counsel’s errors at the penalty phase compel a
13 conclusion that petitioner suffered the ineffective assistance of trial counsel.
14 *United States v. Tucker*, 716 F.2d 576, 595 (9th Cir. 1983) (“a court may find
15 unfairness—and thus prejudice—from the totality of counsel’s errors and
16 omissions.”). The brutal nature of the crimes does not foreclose a finding of
17 prejudice. *See, e.g., Lambright v. Schriro*, 490 F.3d 1103, 1121-27 (9th Cir.
18 2007); *Summerlin*, 427 F.3d at 643; *Stankewitz*, 365 F.3d at 723, 724-35;
19 *Ainsworth*, 268 F.3d at 878; *see also Douglas v. Woodford*, 316 F.3d 1079, 1091
20 (9th Cir. 2003) (“The gruesome nature of the killing did not necessarily mean the
21 death penalty was unavoidable.”).

22 In addition to counsel’s many errors, the Court is aware of the personal
23 circumstances counsel faced at the time of trial. Counsel was appointed to
24 represent petitioner in March of 1982. Petitioner’s trial began a year later. In
25 December of 1982, a little more than three months before trial, counsel was
26 diagnosed with esophageal cancer. Esophageal cancer had a recovery rate of only
27 two percent at the time. Counsel had surgery to have part of his stomach and
28 esophagus removed the same month as his diagnosis. Counsel’s doctors believed

1 that excessive drinking and smoking had caused counsel's cancer. Accordingly,
2 counsel's wife organized an intervention while counsel recovered from surgery in
3 the hospital. During that timeframe, counsel took a lot of pain medication,
4 including Percodan. He sometimes took up to eight a day. He also began a course
5 of weekly chemotherapy. Counsel was unable to work on petitioner's case from
6 early December until mid-February. His time cards do not include any entries from
7 December 3, 1982 through February 16, 1983. (1 CDD 8-9.)

8 When counsel returned to work in February 1983, he discussed his
9 condition with the trial judge in chambers:

10 He was a friend of mine and I think he called me into
11 chambers, commented that I was not looking too well and asked if I
12 wanted to be relieved. I think this discussion was off the record. I
13 told him I thought I was okay but that I wouldn't hold it against him if
14 he decided to appoint someone else. I wasn't feeling very well, but
15 Judge Mullendore was a friend and I felt badly the case had already
16 been delayed because of the Public Defender's conflict, and I did not
17 want to be the cause of further delay. I also think that I was in denial
18 about the seriousness of my situation and did not want to believe that
19 I was not well enough to try the case. I had no idea at that point how
20 debilitating the chemotherapy treatment would be.

21 (1 CDD 9-10.) The trial court appointed a second attorney to assist counsel. His
22 "role was a limited one; he was not appointed to play an active part in the trial but
23 only to assist me by picking up transcripts, taking notes and other odds and ends.
24 During trial, he was like a baby sitter; he would drive me to his house during the
25 noon recess so that I could take a nap. He did not participate in any of the strategic
26 decisions but basically functioned as a 'gofer.'" (1 CDD 10.)

27 As trial continued, the cumulative effects of the chemotherapy wore on
28 counsel. He recalls: "I was very tired all the time . . . I could not eat during the
day, because I would throw up or be afraid that I would throw up. When I tried to
eat at night, I would throw up or get dry heaves. My weight dropped from 180 to
135, and my focus and attention were off[.] [M]y hair turned grey and I stopped

1 washing it because I did not want to lose it.” (1 CDD 11.) He describes his work
 2 habits both prior to and during trial:

3 When I was in trial prior to my illness, I would work on the
 4 case all the time—at lunch, after dinner and on week-ends, and my
 5 life would revolve around the trial. My work habits were much
 6 different during Francis’[s] trial. I was tired and barely made it
 7 through the day. I would nap at lunchtime and could only work for
 8 about an hour at the end of the court day and then I would go home,
 9 try to eat and sleep. My life revolved around chemotherapy: I was
 10 preoccupied with when I would take it, when I would see the doctors,
 11 when I would get my blood tests, and that sort of thing. At that point,
 12 my survival was very much in doubt. It was a very difficult time, and
 13 the chemotherapy did such a job on me that five years later it caused
 14 my wife to refuse chemotherapy to treat her cancer and she died as a
 15 result.

16 (1 CDD 11-12.)

17 The Court granted summary judgment to respondent based on petitioner’s
 18 claim that counsel’s illness, on its own, denied petitioner the effective assistance of
 19 counsel. (Summary Judgment Order at 16-19.) It is still the case that counsel’s
 20 serious illness during trial preparation, trial and sentencing does not stand alone as
 21 a basis for habeas relief. However, counsel’s illness does help explain the many
 22 deficiencies at trial: “Having cancer was a death warrant and I had a lot of things
 23 that I had planned to do that I simply forgot to do, didn’t do, a lot of things
 24 changed in one hell of a hurry.” (10 CDD 37-38.) Moreover, many court’s have
 25 recognized that an attorney’s physical or mental illness may impair counsel’s
 26 judgment. *See, e.g., Tippins v. Walker*, 77 F.3d 682, 686 (2nd Cir. 1996)
 27 (recognizing that the effectiveness of counsel depends in part on the attorney being
 28 present and attentive); *Gravley v. Mills*, 87 F.3d 779, 786 (6th Cir. 1996)
 (recognizing that many of counsel’s mistakes may be attributed to medication and
 that counsel’s illness “had to have been a major distraction” during trial); *see also*
Smith v. Ylst, 826 F.2d 872, 876 (9th Cir. 1987) (“Although there is some merit to

1 the argument that a mentally unstable attorney may make errors of judgment that
 2 are essentially unidentifiable by a reviewing court, it is reasonable to treat such
 3 cases under the general rule requiring a showing of prejudice We believe
 4 it prudent to evaluate the attorney's actual conduct of a trial in light of
 5 allegations of mental incompetence.”)

6 Counsel's many errors, committed when he was unable to perform
 7 competently, resulted in constitutionally inadequate representation. “Here,
 8 [petitioner] has alleged mitigating facts that might well have rebalanced the scale
 9 against death for some jurors.” *Stankewitz*, 365 F.3d at 275.

10 Accordingly, the Court GRANTS Claim 5(D)(40).

11 **D. Juror Misconduct Claims & Related IAC Claims**

12 **1. Juror Wagner's contact with her minister during** 13 **deliberations (Claims 4(A)(1) & Claim 4(A)(7)(d))**

14 In Claims 4(A)(1) and 4(A)(7)(d), petitioner contends that Juror Louise
 15 Wagner consulted with her minister during a weekend break in the penalty phase
 16 deliberations and that this instance of juror misconduct prejudiced him.

17 **a. Relevant Facts**

18 The Court held an evidentiary hearing on this claim. Prior to the evidentiary
 19 hearing, Juror Wagner signed conflicting declarations. In the first declaration,
 20 which petitioner submitted, Juror Wagner made the following statements:

21 During the trial, after the guilt phase and while the penalty
 22 phase was ongoing, I met with my Episcopalian Priest at our Church,
 23 St. Francis Episcopal Church, in Palos Verdes Estate, California. It
 24 was a Sunday and I had a private discussion with my priest the
 25 Reverend Mr. Robert A. TOURIGNEY, since retired. There were no
 other persons present at the time of our discussion

26 The conversation with my priest gave me an opportunity to talk
 27 to someone. During my discussion with the Reverend Mr. Tourigney,
 28 I told him that I was a juror in a criminal trial. I told him that I was
 agonizing over the fact that I had to make a decision that could mean
 life or death for the individual on trial. The only comment Reverend

1 Tourigney made was to say that the only thing I had to consider was
2 whether or not there was a possibility of rehabilitation. He made no
3 other statements.

4 (8/9/90 Declaration of Louise M. Wagner ("Wagner Decl. 1"), ¶ 3-4.) About four
5 months later, Juror Wagner signed a second declaration, which respondent
6 obtained. She clarified her earlier declaration, as follows:

7
8 In Paragraph 4, it states, in part, "The only comment Reverend
9 Tourigney made was to say that the only thing I had to consider was
10 whether or not there was a possibility of rehabilitation. He made no
11 other comments." ¶ This statement is misleading to the extent that I
12 should consider *only* rehabilitation or that I could not consider
13 anything else. The Reverend Tourigney never said to only consider
14 rehabilitation. ¶ The more accurate statement would be that "The
15 Reverend Tourigney said that I had to consider whether or not there
16 was a possibility of rehabilitation, and that any decision on the
17 outcome of any trial would be mine and mine alone." ¶ The meeting
18 with Rev. Tourigney took place after Sunday mass in the Coffee
19 Room with perhaps 100-150 people milling about. The Reverend
20 Tourigney spent less than 60 seconds with me, while mingling about
21 the room to greet church-goers.

22 (12/14/89 Declaration of Louise M. Wagner ("Wagner Decl. 2"), ¶ 3-6.) In
23 response to Juror Wagner's second declaration, petitioner submitted the
24 declaration of Edward O'Shea, a private investigator who obtained Juror Wagner's
25 first declaration and who attested to its accuracy.

26 The Court granted an evidentiary hearing in part because the facts
27 concerning what Rev. Tourigney told Juror Wagner were in dispute. The Court
28 reasoned that if Rev. Tourigney in fact told Juror Wagner to consider *only*
rehabilitation, that advice would have been in direct contravention of the law,
which requires a capital jury at the sentencing phase to "be able to consider and
give effect to all mitigating evidence offered by [the] petitioner." (Order Granting
Petitioner's Motion for Evidentiary Hearing in Part and Denying Motion in Part
("Evidentiary Hearing Order"), filed Dec. 21, 1999 (Docket No. 119) at 10-11

1 (citations and internal quotation marks omitted).)

2 As part of the evidence taken at the evidentiary hearing, the parties deposed
3 all of the surviving jurors, including Juror Wagner. Juror Wagner attended mass
4 each Sunday at St. Francis Episcopal, and she respected Rev. Tourigney, who
5 served as the rector of the church. (Wagner Depo. at 17, 21-22.) On Sunday, May
6 8, 1983, during a weekend break in the penalty phase deliberations, Juror Wagner
7 attended services at St. Francis. (*Id.* at 21.) That day, Juror Wagner spoke with
8 Rev. Tourigney during coffee time after mass. (*Id.* at 20, 29.) She did not have “a
9 private, special meeting” with Rev. Tourigney, but, instead, the two spoke just a
10 couple of sentences during a brief encounter. (*Id.* at 29; *see also id.* at 30 (“I
11 didn’t have a private discussion with him He was standing off to the side and
12 I went over and said what was on my mind, and then he came back with one
13 sentence.”).) Juror Wagner recalls that Rev. Tourigney told her that the “[m]ain
14 thing was the decision would be whether he—the guilty one could be rehabilitated
15 or not.” (Wagner Depo. at 37-38.) She explained further that, “He—he indicated
16 that my decision should be based on whether I felt he could be rehabilitated or
17 not.” (*Id.* at 38.) “He led me to believe that was the main thing in making the
18 decision, in making my decision That was the one sentence that he spoke to
19 me.” (*Id.* at 38-39.) “I told you he said one sentence . . . If he [was] capable of
20 being rehabilitated.” (*Id.* at 48.)

21 Counsel for respondent questioned Juror Wagner about her second
22 declaration. As discussed, respondent obtained Juror Wagner’s second declaration
23 to clarify her earlier statement that Rev. Tourigney told Juror Wagner that the
24 “only thing” she needed to consider was whether or not petitioner could be
25 rehabilitated. The second declaration, specifically paragraph 5 of that declaration,
26 qualified Juror Wager’s first statement as follows: “The more accurate statement
27 would be that ‘The Reverend Tourigney said that I had to consider whether or not
28 there was a possibility of rehabilitation, and that any decisions on the outcome of

1 any trial would be mine and mine alone.” (Wagner Decl. 2 at ¶ 5.) After reading
2 paragraph 5 during her deposition, however, Juror Wagner stated, “I don’t think he
3 ever said that, and I never thought it.” (Wagner Depo. at 37.) This testimony
4 effectively repudiates Juror Wagner’s second declaration, which modified her
5 original statement that Rev. Tourigney told her that the only thing she needed to
6 consider was rehabilitation.

7 The parties also deposed Edward O’Shea, a private investigator. O’Shea
8 worked with the Philadelphia Police Department for twenty-five years, fifteen of
9 those years as a detective. (O’Shea Decl. at 5.) He became a private investigator
10 in 1984 and still worked in that trade at the time of his deposition in 2000. (*Id.*)
11 He interviewed Juror Wagner, with her husband present, three times in 1989. (*Id.*
12 at 7-8.) Juror Wagner told O’Shea that Rev. Tourigney said that “the only thing
13 she had to worry about was whether or not the defendant could be rehabilitated,
14 that “the only thing [she] had to consider was whether or not there was a
15 possibility of rehabilitation.” (*Id.* at 8-9.) At the second meeting, Juror Wagner
16 told O’Shea that “the priest told her the only thing that she would have to worry
17 about was whether or not the defendant could be rehabilitated.” (*Id.* at 11.)
18 O’Shea used his notes to draft an affidavit. (*Id.*) He met with Mr. and Mrs.
19 Wagner a third time on August 9, 1989. (*Id.*) First, Mr. Wagner, an attorney,
20 reviewed the affidavit, followed by Juror Wagner. (*Id.*) According to O’Shea,
21 “[b]oth took great pains in reading it. Both—there was nothing in the affidavit
22 that they questioned or asked.” (*Id.* at 12.) He also said, “They read it, and upon
23 completion of reading it, they both agreed that it was an exact replica of what the
24 contents of her statement was on the 4th. There was no problem in signing it.
25 They were very amicable.” (*Id.*)

26 During the evidentiary hearing, the parties also explored whether
27 Juror Wager told the other jurors about her conversation with Rev. Tourigney.
28 When asked whether she mentioned her conversation with Rev. Tourigney to the

1 other jurors, Juror Wagner provided this confusing answer: “No. They had made
2 their decisions, so I tell them about we’ve—what are they, think I might have.”
3 (Wagner Depo. at 26.) It is unclear whether Juror Wagner told the other jurors
4 about the substance of her conversation with Rev. Tourigney. It seems as if she
5 qualified her initial answer, “No” that she did not tell the other jurors with the last
6 phrase, “think I might have.” George Barber, the foreman, testified that he
7 remembered a female juror entering the jury room during the penalty phase
8 deliberations and announcing that she had consulted with her minister about the
9 case. (Barber Depo. at 14-15.) He believes that Juror Wagner made the
10 announcement “in the jury room at the first part of the day.” (*Id.* at 15.) Juror
11 Barber stated that “maybe [the jury] hadn’t started deliberating,” but that Juror
12 Wagner said it “while we were all in there.” (*Id.*; *see also* Barber Depo. at 16 (“To
13 the best of my memory, it would be that it happened at the jury room.”), 55
14 (testifying that Juror Wagner’s statement that she talked to her minister “was
15 before the trial was over”).) Juror Karen McCracken testified that she remembered
16 a juror having consulted with a reverend during trial. (McCracken Depo. at 30.)
17 She remembered that the incident occurred during the penalty phase of trial and
18 that the juror discussed her consultation with the minister in the jury room, but she
19 could not definitively pinpoint when it happened. (*Id.* at 30, 46.) Juror
20 McCracken did not remember Juror Wagner discussing the particulars of her
21 conversation with her minister. (*Id.* at 31.)

22 In sum, the evidence shows the following: Juror Wagner attended her
23 church during the weekend recess in penalty phase deliberations. She briefly
24 consulted with the rector of her church, who told her either that the “only thing” or
25 “main thing” she had to consider in deciding on the appropriate penalty was
26 whether petitioner could be rehabilitated. Juror Wagner announced to the jury, in
27 the jury room, that she had consulted her minister, but she probably did not share
28 the details of the conversation with her fellow jurors.

1 **b. Applicable law**

2 “The Sixth Amendment guarantees criminal defendants a verdict by
3 impartial, indifferent jurors.” *Dyer*, 151 F.3d at 973; *see also Fields*, 503 F.3d at
4 772 (stating that a defendant’s right to a fair trial means that he or she is entitled to
5 “a jury capable and willing to decide the case solely on the evidence before it.”)
6 (internal quotation marks and citation omitted). “Jury exposure to facts not in
7 evidence deprives a defendant of the rights to confrontation, cross-examination
8 and assistance of counsel embodied in the Sixth Amendment.” *Eslaminia v.*
9 *White*, 136 F.3d 1234, 1237 (9th Cir. 1998).

10 Not every constitutional error supports the grant of a habeas petition,
11 however. *Eslaminia*, 136 F.3d at 1237. No “bright line test exists to assist courts
12 in determining whether a petitioner has suffered prejudice from juror misconduct.”
13 *Mancuso v. Olivarez*, 292 F.3d 939, 950 (9th Cir. 2002), *as amended on denial of*
14 *rehearing*. The key question becomes whether the constitutional error “had a
15 substantial and injurious effect or influence in determining the jury’s verdict.”
16 *Brecht v. Abrahamson*, 507 U.S. 619, 627 (1993) (citing *Kotteakos v. United*
17 *States*, 328 U.S. 750, 776 (1946)). The Court should place “great weight on the
18 nature of the extraneous information that has been introduced into deliberations.”
19 *Sassounian v. Roe*, 230 F.3d 1097, 1109 (9th Cir. 2000), *as amended on denial of*
20 *rehearing* (internal quotation marks and citation omitted). “Juror misconduct
21 which warrants relief generally relates directly to a material aspect of the case.”
22 *Rodriguez v. Marshall*, 125 F.3d 739, 744 (9th Cir. 1997) (internal quotation
23 marks and citation omitted), *overruled on other grounds by Payton v. Woodford*,
24 346 F.3d 1204, 1218 (9th Cir. 2003) (en banc), *reversed on other grounds by*
25 *Brown v. Payton*, 544 U.S. 133 (2005).

26 Various factors help determine “whether the prosecution has successfully
27 rebutted the presumption of prejudice arising from the introduction of extraneous
28 evidence.” *Dickson*, 849 F.3d at 406. These factors include (1) whether the

1 material was actually received; (2) the length of time the information was available
2 to the jury; (3) the extent to which the jurors discussed and considered the
3 information; (4) whether the material was introduced before a verdict was reached;
4 and (5) any other matters which may bear on the issue. *Jeffries v. Wood*, 114 F.3d
5 1484, 1492 (9th Cir. 1997) (en banc) (citing *Bayramoglu v. Estelle*, 806 F.2d 880,
6 887 (9th Cir. 1986)). While instructive, these considerations do not definitively
7 decide the issue of prejudice. *Dickson*, 849 F.2d 406; *see also Jeffries*, 114 F.3d at
8 1489-90 (holding that other “factors might . . . suggest that the potential prejudice
9 of the extrinsic information was diminished in a particular case and therefore that
10 the extrinsic evidence did not substantially and injuriously affect the verdict.”).
11 The Court also may take into account (1) whether the prejudicial statement was
12 ambiguously phrased; (2) whether the extraneous information was otherwise
13 admissible or merely cumulative of other evidence adduced at trial; (3) whether a
14 curative instruction was given or some other step taken to ameliorate the prejudice;
15 (4) the trial context; and (5) whether the statement was insufficiently prejudicial
16 given the issues and evidence in the case. *Id.* at 1491-92. An error that does not
17 have a substantial and injurious effect on the outcome of the trial is deemed
18 harmless. *Eslaminia*, 136 F.3d at 1237 (citing *Bonin*, 59 F.3d at 824).

19 The Court must limit the evidence it considers in evaluating the jury’s
20 exposure to improper evidence and the prejudice flowing from that error.
21 *Sassounian*, 230 F.3d at 1108. Federal Rule of Evidence 606(b) states:
22

23 [A] juror may not testify as to any matter or statement occurring
24 during the course of the jury’s deliberations or to the effect of
25 anything upon that or any other juror’s mind or emotions as
26 influencing the juror to assent to or dissent from the verdict or
27 indictment or concerning the juror’s mental processes in connection
28 therewith. But a juror may testify about (1) whether extraneous
prejudicial information was improperly brought to the jury’s attention,
(2) whether any outside influence was improperly brought to bear
upon any juror, or (3) whether there was a mistake in entering the
verdict onto the verdict form. A juror’s affidavit or evidence of any
statement by the juror may not be received on a matter about which
the juror would be precluded from testifying.

1 Fed. R. Evid. 606(b). “A long line of precedent distinguishes between juror
2 testimony about the consideration of extrinsic evidence, which may be considered
3 by a reviewing court, and juror testimony about the subjective effect of evidence
4 on the particular juror, which may not.” *Sassounian*, 230 F.3d at 1108. In short,
5 “the question of prejudice is an objective, rather than a subjective, one.” *Dickson*,
6 849 F.2d at 406; *see also Rodriguez*, 125 F.3d at 744 (“We are not to consider
7 evidence concerning the subjective impact of extrinsic evidence on the
8 deliberation process, and instead focus on an objective inquiry into the potential
9 for prejudice from the extraneous information.”) The Court must therefore ignore
10 Juror Wagner’s testimony about how the conversation she had with her minister
11 actually influenced her during the deliberative process, although such testimony
12 would provide “the most direct evidence of prejudice.” *Sassounian*, 230 F.3d at
13 1109. This lends an “Alice in Wonderland quality to the discussion of whether
14 [petitioner] was actually prejudiced by the admitted jury misconduct,” but it is
15 nevertheless what the law requires. *Id.* (internal quotation marks and citation
16 omitted).

17 c. Analysis

18 The facts demonstrate that an error took place during the penalty phase.
19 Juror Wagner sought advice from her rector, Rev. Tourigney, who told Juror
20 Wagner that rehabilitation was either the “only” or the “main” thing she had to
21 consider. Juror Wagner was therefore exposed to extraneous information. The
22 Court must look to the many factors enumerated in the case law to determine if
23 this error had a substantial and injurious effect on the penalty phase verdict.

24 First, the Court considers whether the material was actually received. It
25 was. Rev. Tourigney told Juror Wagner either that the “only” thing or the “main”
26 thing she should consider was petitioner’s potential for rehabilitation. The day
27 after her encounter with her rector, Juror Wagner announced to the jury that she
28 had consulted her minister, but she did not share the details of their conversation.

1 Second, the Court must evaluate the length of time the information was
2 available to the jury. Juror Wagner talked to Rev. Tourigney on Sunday after
3 mass, so the information was available to her for a full day. She returned to
4 deliberate with the jury the next morning. Juror Wagner announced to her fellow
5 jurors that she consulted with Rev. Tourigney “at the first part of the day.”
6 (Barber Depo. at 15.) Deliberations began at 9:30 a.m., and the jury returned with
7 a verdict a few minutes after noon. (14 RT 3690.) The jurors knew Juror Wagner
8 had consulted with her minister for several hours before they reached a verdict, but
9 they did not know what Juror Wagner and the reverend discussed.

10 Third, the Court looks at the extent to which the jurors discussed and
11 considered the information. In this case, the jury did not discuss or consider the
12 advice Juror Wagner received from Rev. Tourigney because she did not share the
13 details of her conversation with the jury. The jury may have considered the fact
14 that Juror Wagner consulted her minister in its penalty phase deliberations.

15 Fourth, the Court should inquire whether the material was introduced before
16 a verdict was reached. The jury learned that Juror Wagner consulted
17 Rev. Tourigney for advice on how to vote in the penalty phase before the jury
18 reached a penalty phase verdict. She told her fellow jurors that she had consulted
19 her minister at the beginning of the last day of deliberations, and the court read the
20 penalty verdict just after noon.

21 In addition, the Court may consider a handful of other factors. First, the
22 statement by Rev. Tourigney, as reported by Juror Wagner, was not ambiguously
23 phrased. He told her that whether petitioner could be rehabilitated was the “only”
24 or “main” thing she needed to consider. The parties have spent a considerable
25 amount of post-hearing briefing arguing about whether Rev. Tourigney used the
26 words “only thing” or “main thing” when he talked to Juror Wagner. Juror
27 Wagner appears to have used the words “only thing” or “main thing”
28 interchangeably in describing her conversation with Rev. Tourigney. The

1 distinction between the two phrases is one that makes little difference to the
2 ultimate outcome in any event, as discussed below.

3 Second, Rev. Tourigney's statement that Juror Wagner should consider
4 rehabilitation as the "only" or "main" thing was neither admissible evidence nor
5 cumulative of other evidence adduced at trial. Also as discussed below,
6 Rev. Tourigney's statements were in contravention to the law, so they certainly
7 would not have been admissible. His focus on rehabilitation did not constitute
8 cumulative evidence, though the parties did elicit some evidence regarding
9 rehabilitation at the penalty phase, and the prosecutor repeatedly mentioned the
10 issue in his closing. That issue also is discussed below.

11 Third, no curative instruction or other action was taken to ameliorate the
12 prejudice because neither the court, nor the attorneys knew about Juror Wagner's
13 communication with her minister.

14 Lastly, the Court evaluates whether Rev. Tourigney's advice to Juror
15 Wagner was insufficiently prejudicial given the issues and evidence in the case.
16 While only Juror Wagner was exposed to Rev. Tourigney's advice on how to
17 approach the penalty phase deliberations, the Constitution guarantees petitioner's
18 right "to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors."
19 *Parker v. Gladden*, 385 U.S. 363, 366 (1966); *see also Dyer*, 151 F.3d at 973
20 ("The bias or prejudice of even a single juror would violate [petitioner's] right to a
21 fair trial."); *Dickson*, 849 F.3d at 408 ("If only one juror was unduly biased or
22 improperly influenced, [petitioner] was deprived of his Sixth Amendment right to
23 an impartial panel."). Moreover, Rev. Tourigney spoke to Juror Wagner about an
24 issue directly related to a material aspect of the case, namely whether or not she
25 should vote for life in prison or the death penalty. *See Rodriguez*, 125 F.3d at 744
26 ("Juror misconduct which warrants relief generally relates directly to a material
27 aspect of the case.") (internal quotation marks and citation omitted).

28 Furthermore, Rev. Tourigney's advice directly contravened the law, whether

1 he told Juror Wagner that rehabilitation remained the “only thing” or the “main
 2 thing” she had to consider. “The Eighth Amendment requires that the jury be able
 3 to consider and give effect to all relevant mitigating evidence offered by
 4 petitioner.” *Boyde v. California*, 494 U.S. 370, 377-78 (1990) (citing *Lockett v.*
 5 *Ohio*, 438 U.S. 586 (1978)). Advice that Juror Wagner had to consider *only*
 6 rehabilitation to the exclusion of other mitigating evidence would have violated
 7 the constitutional mandate that jurors be allowed to consider all relevant mitigating
 8 evidence presented by petitioner at trial.

9 Likewise, if Rev. Tourigney advised Juror Wagner to consider rehabilitation
 10 as the “main thing,” such advice also would have violated the Constitution. The
 11 California Supreme Court has held that the 1978 death penalty statute at force in
 12 this case must not be construed to “require[] jurors to render a death verdict on the
 13 basis of some arithmetical formula, or . . . to impose death on any basis other than
 14 their own judgment that such a verdict was appropriate.” *People v. Brown*, 40 Cal.
 15 3d 512, 540 (1985). The *Brown* Court also held that the use of the word
 16 “weighing” in the death penalty statute

17
 18 is a metaphor for a process which by nature is incapable of precise
 19 description. The word connotes a mental balancing process, but
 20 certainly not one which calls for a mere mechanical counting of
 21 factors on each side of the imaginary “scale,” or the arbitrary
 22 assignment of “weights” to any of them. *Each juror is free to assign*
 23 *whatever moral or sympathetic value he deems appropriate to each*
 24 *and all of the various factors he is permitted to consider, including*
 25 *factor (k) By directing that the jury ‘shall’ impose the death*
 26 *penalty if it finds that aggravating factors ‘outweigh’ mitigating, the*
 27 *statute should not be understood to require any voter to vote for the*
 28 *death penalty unless, upon completion of the “weighing” process, he*
 29 *decides that death is the appropriate penalty under all the*
 30 *circumstances.*

31 *Id.* at 541 (emphasis added). The *Brown* Court also held that the “jury must be
 32 free to reject death if it decides on the basis of *any* constitutionally relevant
 33 evidence or observation that it is not the appropriate penalty” and that “the
 34 decision is the responsibility of the jury and no one else.” *Id.* at 540.

1 Rev. Tourigney usurped Juror Wagner's role by advising her to consider
2 rehabilitation as the only or main thing in her analysis. His advice suggested that
3 rehabilitation was the most important factor, and *he* assigned it the weight *he*
4 thought it should have, when that task is the exclusive province of the individual
5 jurors. Petitioner's interest in Juror Wagner following the California death penalty
6 statute as construed by the California Supreme Court does not involve "the denial
7 of a procedural right of exclusively state concern." *Hicks v. Oklahoma*, 447 U.S.
8 343, 346 (1980). Stated another way, "where . . . a State has provided for the
9 imposition of criminal punishment in the discretion of the trial jury, it is not
10 correct to say that the defendant's interest in the exercise of that discretion is
11 merely a matter of state procedural law." *Id.* "The defendant in such a case has a
12 substantial and legitimate expectation that he will be deprived of his liberty only to
13 the extent determined by the jury in the exercise of its statutory discretion, and that
14 liberty interest is one that the Fourteenth Amendment preserves against arbitrary
15 deprivation by the State." *Id.* Rev. Tourigney advised Juror Wagner to elevate
16 one consideration, whether or not petitioner could be rehabilitated, over all of the
17 other factors contained in the death penalty statute. This advice directed Juror
18 Wagner to act outside her statutory discretion, as contemplated by California law.
19 "Such an arbitrary disregard of the petitioner's right to liberty is a denial of due
20 process of law." *Hicks*, 447 U.S. at 346.

21 To complicate matters, rehabilitation was an issue at the penalty phase.
22 Petitioner presented weak evidence of rehabilitation. Petitioner put his paternal
23 aunt—who saw him only a few times a year for his entire life—on the stand.
24 Petitioner's counsel asked if she felt that she could help petitioner lead a
25 productive life in prison. She testified:

26 I know it is possible. I think Francis has the potential, given
27 his own motivation. ¶ If he is capable of making his own motivation
28 for his deciding to do this and, second, if he can get the help that he
needs. I believe he needs strict supervision and that he needs to be in

1 a very structured environment and that he needs not to be free to do as
2 he pleases for a very long time. ¶ I also believe that he needs a great
3 deal of psychiatric help. I don't know what kind of thing can be
4 arranged in the future, but I do know that once I get my nursing
degree, I will be in a position to afford to pay for his private
psychiatric care, if such a thing is available.

5 (14 RT 3559-60.) Petitioner also put on two mental health experts, each of whom
6 offered testimony that petitioner may do well in a controlled prison setting.

7 Dr. Girsh, a clinical and forensic psychologist, testified that she had "no indication
8 that [petitioner] would be difficult" in a structured prison setting. (14 RT 3589-
9 90.) Dr. Maloney, a clinical psychologist, testified that "this type of person does
10 well if they have extreme limits" and that the structure of prison "may not alter the
11 underlying problem but would alter the behavior." (14 RT 3479, 3484.) On cross
12 examination, the prosecutor elicited testimony from Dr. Maloney that "[i]f they did
13 offer [petitioner] treatment in the prison system . . . there is a possibility of
14 changing the underlying situation," but his realistic hope for that possibility was
15 moderate based on "what's available in the prison system." (14 RT 3484.)

16 Trial counsel did not argue rehabilitation per se in his closing argument,
17 though he did twice mention that petitioner probably would do well in a structured
18 prison setting. (14 RT 3666, 3679.) In the prosecutor's closing argument,
19 however, he repeatedly mentioned the issue of rehabilitation. (14 RT 3635
20 ("Psychologists have testified to what [petitioner] is, and considering the basis of
21 his background as to how he got there and how he can, if he can, change."), 3648
22 ("Do you think he will change in principle? Dr. Maloney was asked if he had any
23 realistic hope for this. You saw him. He testified. His answer: Moderate, given
24 what's available."), 3648 ("Given what's available, will he change? Will anybody
25 change once their personality problems have become fixed? Maybe. His mother
26 is hopeful that, given religious beliefs, maybe this will help, if not psychological
27 treatment. Presumably, both will be provided, if not by the prison facilities, by the
28 aunt who has a degree in theology and sociology, has worked with women in

1 rehabilitation type settings before, and hopefully will commit herself to the
2 defendant and change him.”), 3677 (“Consider what he has done in the past, what
3 he is now as seen here, and what you think he can ever be.”))

4 The evidence presented in the penalty phase, taken together with the
5 prosecutor’s focus on rehabilitation during his closing argument, increases the
6 likelihood that Rev. Tourigney’s advice had a substantial and injurious effect or
7 influence on the penalty phase verdict. The sum total of the rehabilitation
8 evidence presented included two psychologists testifying that petitioner may
9 function well in a highly structured prison setting; one psychologist testifying that
10 he had a moderate hope for the possibility of petitioner’s rehabilitation during
11 incarceration, but that he worried about the quality of care petitioner would
12 receive; and a paternal aunt without a close relationship with petitioner who
13 believed that petitioner could have a productive life while incarcerated, if he
14 became motivated to do so and if he received psychiatric care. This evidence
15 failed to present a compelling case for rehabilitation, which may explain why
16 counsel did not argue the issue in his closing.

17 Given the poor evidence and the prosecutor’s focus on rehabilitation,
18 Rev. Tourigney’s advice may have invited Juror Wagner to erroneously consider
19 petitioner’s poor prospects for rehabilitation as an aggravating factor. However,
20 the California Supreme Court has limited the jury’s consideration of aggravating
21 factors to those enumerated in the statute. *People v. Boyde*, 38 Cal. 3d 762, 773
22 (1985) (“By . . . requiring the jury to decide the appropriateness of the death
23 penalty by a process of weighing the specific factors listed in the statute, the
24 initiative necessarily implied that matters not within the statutory list are not
25 entitled to any weight in the penalty determination.”) A prosecutor may rely only
26 on the statutorily enumerated aggravating factors listed in California Penal Code
27 Section 190.3. *Boyde*, 38 Cal. 3d at 775-76. While the prosecution may attempt to
28 rebut evidence of rehabilitation introduced by a defendant, it may not rely on

1 petitioner's poor prospects for rehabilitation as an affirmative aggravating factor.
2 *See* Cal. Pen. Code § 190.3; *People v. Benson*, 52 Cal. 3d 754 (1990) (holding that
3 future dangerousness is not a statutory aggravating factor but that prosecutor could
4 attempt to rebut evidence admitted to show defendant would act peaceably in
5 prison).

6 Moreover, the prosecutor may argue that petitioner failed to put on
7 affirmative evidence of rehabilitation, but may not argue that the jury can consider
8 the paucity of evidence on the subject as a positive aggravating factor. *See, e.g.,*
9 *People v. Crittenden*, 9 Cal. 4th 83, 149 (1994) (holding that "the prosecutor may
10 not argue that the absence of a mitigating factor constitutes the presence of an
11 aggravating factor"). Rev. Tourigney's open-ended advice that the only or main
12 thing Juror Wager had to consider was whether petitioner could be rehabilitated
13 may have caused Juror Wagner to believe that she could consider the evidence
14 concerning rehabilitation, which tended to show that petitioner had a slim chance
15 at reforming himself, as a nonstatutory aggravating factor. Again, petitioner has
16 an individual liberty interest in Juror Wagner exercising her discretion as limited
17 by the California death penalty statute. *Hicks*, 447 U.S. at 346. Rev. Tourigney's
18 advice could have impermissibly encouraged Juror Wagner to consider the low
19 likelihood of petitioner being rehabilitated as an aggravating factor, resulting in an
20 "arbitrary disregard of petitioner's right to liberty," and a consequent "denial of
21 due process of law." *Id.*

22 In evaluating prejudice, "[t]he inquiry cannot be merely whether there was
23 enough to support the result." *Olivarez*, 292 F.3d at 950 (quoting *Kotteakos*, 238
24 U.S. at 765). The question the Court must answer is whether Juror Wagner's
25 consultation with Rev. Tourigney, and his attendant advice that rehabilitation was
26 the only or main thing she should consider in deciding whether to vote for the
27 death penalty, "had a substantial influence." *Olivarez*, 292 F.3d at 950 (citation
28 and internal quotation marks omitted). If the Court answers that question in the

1 affirmative, or if the Court “is left in grave doubt, the conviction cannot stand.”
 2 *Olivarez*, 292 F.3d at 939 950 (citation and internal quotation marks omitted). Put
 3 another way, “[w]here the record is so evenly balanced that a conscientious judge
 4 is in grave doubt as to the harmlessness of an error, the error is not harmless and
 5 relief should be granted.” *Jeffries*, 114 F.3d at 1489-90; *see also O’Neal v.*
 6 *McAninch*, 513 U.S. 432, 435 (1995) (“By ‘grave doubt’ we mean that, in the
 7 judge’s mind, the matter is so evenly balanced that he feels himself in virtual
 8 equipoise as to the harmlessness of the error.”) Given the nature of the advice
 9 Rev. Tourigney offered Juror Wagner, its materiality to the penalty phase
 10 deliberations and the degree to which the prosecutor focused on petitioner’s
 11 inability to be rehabilitated, the Court is left with grave doubt as to the
 12 harmlessness of this error. Juror Wagner’s consultation of her minister had a
 13 substantial and injurious effect on the penalty phase verdict.

14 Accordingly, the Court GRANTS Claims 4(A)(1) and 4(A)(7)(d).

15 **2. Jury’s exposure to prejudicial newspaper article (Claims**
 16 **4(A)(2), & 5(D)(18), 5(D)(24) & 5(D)(25))**

17 In Claim 4(A)(2), petitioner claims that the jury was exposed to the contents
 18 of a prejudicial newspaper article that identified petitioner as a suspect in the
 19 strangulation of two girls in an unrelated case. Petitioner contends that this error
 20 caused him substantial and injurious prejudice at the penalty phase. In Claim
 21 5(D)(18), petitioner alleges that trial counsel failed to minimize the impact of false
 22 reports that petitioner was linked to a criminal investigation in San Luis Obispo.
 23 In Claim 5(D)(24), petitioner claims that trial counsel failed to renew his request to
 24 sequester the jury during the penalty phase. In Claim 5(D)(25), petitioner claims
 25 that trial counsel failed to challenge several jurors, even though he knew or should
 26 have known that they had been exposed to the newspaper article.

27 The Court held an evidentiary hearing on Claim 4(A)(2). The order
 28 granting an evidentiary hearing stated the following:

Petitioner has alleged facts which, if proven, would entitle him to relief. Petitioner alleges that the jurors were exposed to extrinsic evidence that he was the key suspect in two other strangulation murders in San Luis Obispo County. This information was prejudicial because Petitioner had just been convicted of strangling his victims in the instant case. Furthermore, if what Petitioner alleges is true, the jury had this information throughout the pendency of the penalty phase, during which it was instructed to consider whether aggravating circumstances, such as prior acts of violence committed by petitioner, outweighed any mitigating evidence. Extrinsic evidence that Petitioner was being charged with other strangulation murders, therefore, was directly related to a material aspect of the case. *See Rodriguez v. Marshall*, 125 F.3d at 744 (“Juror misconduct which warrants relief generally relates ‘directly to a material aspect of the case’”) (citations omitted).

Moreover, Petitioner did not receive a full and fair hearing regarding this issue in state court. Although the state trial court conducted a hearing, it was not complete. Specifically, the trial court failed to ask two jurors, Juror Thornton and Juror Bovee, whether they had “heard anything” pertaining to the article. In their declarations taken after the trial, however, Juror Thornton and Juror Bovee stated that they had heard other jurors discussing the contents [of] the article in the jury room. Because Petitioner has alleged facts which, if proved, would entitle him to relief, and he did not receive a full and fair hearing regarding this issue in state court, this court grants his motion for an evidentiary hearing on this claim.

(Evidentiary Hearing Order at 16.)

a. Relevant Facts

The guilt phase concluded on Monday, April 25, 1983. (13 RT 3267-84.) The trial court dismissed the jury with instructions to return for the penalty phase on Thursday, April 28, 1983. (13 RT 3288.) That Thursday morning, an article about petitioner appeared on the front page of the *Independent Press Telegram*, a Long Beach newspaper, with the headline, “L.B. Killer Faces New Charge.” (Petition for Writ of Habeas Corpus (filed in the Supreme Court of the State of California), Exh. L.) Next to the headline appeared a photo of petitioner, bearing a caption with his name and the words “Strong Suspect.” (*Id.*) The article continued on the back page of the front section of the paper with the headline,

1 “L.B. Murderer Facing New Charge.” (*Id.*) The article focused on petitioner’s
2 connection to the strangulation murder of two preschool-aged girls in San Miguel.
3 (*Id.*) The article quoted a sheriff’s detective as describing the unsolved San
4 Miguel murders as having “very similar characteristics” to the Long Beach
5 murders because all of the victims had been strangled. (*Id.*) It also reported that
6 sheriffs detectives had confirmed that petitioner was in San Miguel on the day the
7 little girls disappeared and that he drove the same van used in the Long Beach
8 crimes. (*Id.*) The article stated that detectives investigating the San Miguel
9 murders attempted to interview petitioner about the crimes, but he refused to make
10 a statement. (*Id.*) In addition, the article stated that in his taped confession
11 regarding the Long Beach murders, petitioner asked for psychiatric help and told
12 authorities, “I never did anything like that (before) in my whole life.” (*Id.*) The
13 parties have stipulated that petitioner is not considered a suspect in the San Miguel
14 murders. (Stipulation as to Facts Regarding Juror Misconduct, p. 1-2, ¶ 1 (filed
15 July 26, 2002)).

16 When the trial reconvened on Thursday, April 28th, petitioner’s counsel
17 moved for selection of a new penalty phase jury based in part on the newspaper
18 article that appeared in the *Independent Press Telegram*. (13 RT 3290-91.) The
19 trial court recessed until Monday, May 2, 1983, when it took up the motion. (13
20 RT 3292.) Petitioner’s counsel stated his concern that five of the jurors lived in
21 Long Beach and that three of them took the *Independent Press-Telegram*. (13 RT
22 3293-94.) After some back and forth, the trial court agreed to question the jurors
23 individually about whether they had read any articles about petitioner since
24 returning the guilty verdict. (13 RT 3297.)

25 On voir dire, Juror Huffman stated that she saw a headline before she could
26 stop herself but that she did not read the article. (13 RT 3301.) When she saw
27 petitioner’s name, she turned away. (13 RT 3301.) Juror Bovee stated that she
28 saw petitioner’s picture on the front page of the paper and that she read the caption

1 underneath the photo. (13 RT 3304- 3305.) Juror Thornton admitted that he read
 2 the entire article. (13 RT 3308.) Juror Barber stated that he did not read anything
 3 about petitioner but that he heard there was something in the news, though “they
 4 didn’t tell [him] what it was.” (13 RT 3306.) When asked by the trial court,
 5 “There was no discussion as to what it was, is that right?” Juror Barber responded,
 6 “No.” (13 RT 3306.) The rest of the jurors stated that they had not read anything
 7 about petitioner. (13 RT 3303, 3306-07, 3307, 3308-09, 3309, 3309-10, 3310,
 8 3311, 3312, 3313.) At the conclusion of voir dire, the trial court concluded that
 9 Jurors Huffman, Bovee and Thornton were exposed to the article and excused all
 10 of them from service. (13 RT 3313-14.)

11 Petitioner’s counsel argued that Juror Barber also had been potentially
 12 exposed to the article and asked that the trial court question him again. 13 RT
 13 3317-19.) The trial court obliged:

14
 15 Q: Mr. Barber, you indicated that you had heard there was
 16 an article in the newspaper naming the defendant, is that
 correct?

17 A: Yes.

18 Q: Did they mention what the subject of that article was
 19 concerning . . . ?

20 A: No, only that it took the first page of the newspaper.

21 Q: Was there any mention of the subject matter at all?

22 A: No.

23 Q: There was no discussion about it, is that correct?

24
 25 A: Just something that was about the first page, though.
 The headlines in the newspaper is what they—

26 Q: In other words, is the court stating this fairly:
 27 ¶ Someone told you there was an article on the first page
 28 of the paper and a headline, and *you discussed the*
defendant, is that correct?

1 A: Well, what they said was—his wife is cutting out—doing
 2 the editing of the paper prior to him reading it, and he
 3 said, “There must have been something important in
 4 there, because she cuts out all the stuff that has to do
 5 with this trial.” And it was on the front page of the
 6 paper, so he didn’t read what was there, and he said that
 7 she only cuts out just the articles, and she cut out the
 8 whole front page, so—

9 Q: So they took his paper, huh?

10 (13 RT 3319-20 (emphasis added).) It is unclear if the italicized portion of the
 11 quote indicates an error in the transcription or if the trial court erred in speaking.
 12 The trial court concluded that Juror Barber had not been exposed to the article and
 13 retained him on the jury.

14 The Court granted an evidentiary hearing to explore whether the jurors
 15 learned about or discussed the newspaper article on the day it appeared in the
 16 paper, as suggested by the declarations of Jurors Thornton and Bovee obtained in
 17 1990 and 1989, respectively. Juror Thornton’s declaration stated that on the
 18 morning the article appeared in the *Independent Press Telegram*, “I entered the
 19 jury room but was unable to sit at the table because not only were all the regular
 20 jurors present, but also all of the alternates.” (Reply Brief in Support of Petition
 21 for Writ of Habeas Corpus (filed in the Supreme Court of the State of California),
 22 Exh. F (“Thornton Decl.”) at 1, ¶ 3.) He continued, “On that occasion, I heard the
 23 jurors discuss the contents of a newspaper article stating that Francis Hernandez
 24 had been implicated in the murder of two other girls in Northern California.”
 25 (Thornton Decl. at 1, ¶ 3.) Juror Bovee’s declaration recounts that “a fellow juror
 26 who I believe was Mr. Thornton, entered the jury room and stated aloud to all the
 27 jurors who were present that he had read a newspaper article that stated that
 28 Francis Hernandez had been implicated in the murder of two other girls in
 Northern California.” (Petition for Writ of Habeas Corpus (filed in the Supreme
 Court of the State of California), Exh. E (“Bovee Decl. 1”) at 1, ¶ 3.) The

1 declaration also stated that “the jury foreman, who I believe was Mr. Barber, told
2 Mr. Thornton to say no more.” (*Id.*) Two months later, Juror Bovee provided an
3 additional declaration. In the second declaration, Juror Bovee said that she wished
4 to clarify paragraph three of her original declaration, quoted above. (Reply Brief
5 in Support of Petition for Writ of Habeas Corpus (filed in the Supreme Court of
6 the State of California), Exh. F (“Bovee Decl. 2”) at 1, ¶ 3.) The second
7 declaration stated, “A juror told the jury that he had read a newspaper article that
8 implicated Francis Hernandez in the murder of two other girls in Northern
9 California. I recall that there were several jurors present—more than six jurors
10 and possibly all.” (*Id.*) The substance of this second declaration is very similar to
11 the first one.

12 The parties deposed all of the surviving jurors as part of the evidentiary
13 hearing. Jurors Thornton and Huffman died before they could be deposed. Juror
14 Bovee testified in line with her declarations that a “good-sized,” “colored” man
15 named Fred, who she believed to be Juror Thornton, said that he saw an article in
16 the paper indicating that petitioner “was going to be charged in another case.”
17 (Bovee Depo at 10.) She testified that she believed the juror made the statement in
18 the jury room, that he directed his statement to Foreman Barber and that he did not
19 speak loudly when he talked to Foreman Barber. (*Id.* at 14, 52.) Juror Bovee
20 further testified that the juror’s statements specifically referred to petitioner being
21 implicated in two other murders. (*Id.* at 31, 32, 33.)

22 Juror Barber testified that “sometime in the morning—I don’t remember his
23 name. It’s a black man. I can’t remember his name. He came in and stated that he
24 read something in the newspaper about the case.” (Barber Depo. at 18.) He
25 continued, “And I tried to stop him right quick and say we’re not supposed to do
26 that. You know we’re not supposed to do that. And then I wrote a note to the
27 bailiff to tell the judge that there was a problem.” (*Id.*; see also *id.* at 43 (“I don’t
28 remember what the words were other than he read the newspaper, which we

1 weren't supposed to do, and I stopped him right away. We're not supposed to do
 2 that, and I sent him up to the judge. They were very clear that we weren't
 3 supposed to read newspapers or watch television.".) Juror Barber testified that he
 4 did not know what the content of the article was at that time and that he did not
 5 learn about the content of the article until after the trial concluded. (Barber Depo.
 6 at 18, 26.) Later, however, he offered the following testimony, which suggests
 7 that Juror Thornton said more than just that he read an article about petitioner
 8 without any mention of its content:

9 The thing I remember is the man was sitting down in the jury
 10 room and started talking about it. He wasn't even at the table. He
 11 was sitting against the wall and started talking about that, the
 12 newspaper thing, and as soon as I heard what the conversation was
 13 about or his talking or the conversation, I immediately said, hey, stop it, or
 14 wait. Tried to stop the words before they got any further. Whatever it was
 15 that he had said, I tried to stop him immediately."

16 (*Id.* at 51.)

17 Finally, the parties deposed Juror Rosemarie McClister Jasinski. Juror
 18 Jasinski became a penalty phase juror when the trial court dismissed Jurors Bovee,
 19 Thornton and Huffman. The following exchange took place during her deposition:

20 Q: Do you recall a time in the jury room with some or all of
 21 the other jurors when one of the jurors made reference to
 22 a newspaper article that said in substance that Francis
 23 Hernandez was implicated in the murder of a couple
 24 other young women in Northern California?

25 A: I'm not sure how that was brought out, but I do
 26 remember hearing it, and it was—it was kind of disturbing to
 27 hear it, but there was a woman on the jury—and I'm sorry, I
 28 don't remember her name. She was maybe in her fifties. I
 think she worked with computers. But she was kind of one of
 the leaders, and she—I remember her saying, "He isn't being
 tried for that here. If they choose to try him, it will be a
 separate trial, so we need to get back on our focus to this trial,"
 and I think everybody—everybody did.

 Q: So there was no real discussion about it other than
 the—one of the jurors bringing out that he had read the
 article and the substance of the article?

1 A: I don't remember if they said they read it or how it was
2 brought up, but it was something about two young
3 women that were murdered in Northern California and
4 someone—or it was thought that it was similar
circumstances in the way that they were killed.

5 Q: And Francis Hernandez was the suspect?

6 A: Right.

7 (Jasinski Depo. at 12-13.) She also testified that she “couldn’t tell you the
8 number, but there were jurors present when it was discussed. I couldn’t say if it
9 was five or six or if it was all of us. I don’t remember.” (*Id.* at 17.)

10 The rest of the deposition is largely focused on attempting to pin down
11 exactly where and when Juror Jasinski remembers hearing about the newspaper
12 article. Respondent attempted to elicit testimony that she may have learned about
13 the contents of the article after her jury service ended, but Juror Jasinski repeatedly
14 testified that she learned about the petitioner’s purported connection to the double
15 murder in the deliberation room. (*Id.* at 39 (“[T]he comment was in the
16 deliberation room.”), 40 (“I feel like it was said in the deliberation room, but it
17 may have been said another time when we were together.”), 41 (“I just feel it was
18 in the deliberation room.”), 55 (“... but I believe it was in the jury room that it
19 was said that he was accused of this.”), 56 (“Because we didn’t have discussions
20 like that outside of the deliberation room . . . to my mind that would mean we were
21 in the deliberation room.”), 59 (“I’m remembering that it was in the jury
22 room . . .”), 91 (“We were in the jury room when I first heard about it.”), 93
23 (“Beyond a reasonable doubt this happened in the penalty phase in the jury
24 room.”), 94 (“I’m—I’m fairly certain it happened in the jury room.”).)

25 Juror Jasinski is less certain about the timing of the statement, but the sum
26 total of her testimony suggests that she heard about the article during the penalty
27 phase, or some time after the guilt phase verdict but before the penalty phase
28 verdict. For example, the following exchange took place during her deposition:

1 Q: Do you—can you specifically— remember when this
2 incident occurred?

3 A: Seems to me it was in the penalty phase.

4 Q: And was it before your verdict?

5 A: I believe it was.

6 Q: Was it before the judge questioned all of the—was it
7 before you were placed on the jury as an alternate—I
mean as a sitting juror as opposed to an alternate?

8 A: I couldn't answer that because I was brought in just
9 to—right there between the two, and I don't remember
10 the date of exactly when the newspaper article happened,
so I—I can't answer that.

11 (Jasinski Depo. at 45.) In the end, Juror Jasinski offered consistent testimony that
12 she heard about the contents of the newspaper article sometime after it was printed
13 but before the penalty phase verdict, but she could not remember if it came to her
14 attention before or after the trial court questioned the jurors about the article. Her
15 best testimony on this point is that “[b]eyond a reasonable doubt this happened in
16 the penalty phase in the jury room.” (*Id.* at 93.)

17 Juror Jasinski's testimony suggests that she heard about petitioner's
18 purported involvement with the double murder in San Miguel before the
19 conclusion of the penalty phase, which supports petitioner's theory that the jury
20 was exposed to the newspaper article when Juror Thornton talked about it in the
21 jury room. Juror Jasinski's version of the facts is consistent with Juror Bovee's
22 account that she heard Juror Thornton announce to Juror Barber that he read the
23 article and that other jurors were in the vicinity at the time. It is also corroborates
24 Juror Barber's deposition testimony that Juror Barber overheard Juror Thornton
25 having a conversation about the newspaper article, and he stopped that
26 conversation as soon as he heard what it was about.

27 In summary, the evidence shows the following: Jurors Bovee and Barber
28 offered testimony that Juror Thornton entered the jury room on April 28th and

1 announced that he read a newspaper article about petitioner. Both Jurors Bovee
2 and Jaskinski testified that they heard discussion about the contents of the
3 newspaper article in the deliberation room after the guilt phase verdict but before
4 the penalty phase verdict. Juror Thornton's declaration states that Juror Thornton
5 heard jurors discussing the contents of the newspaper article when he entered the
6 jury room on April 28th. While Juror Barber testified that he did not learn about
7 the contents of the newspaper article, he also testified that he overheard Juror
8 Thornton having a conversation about the newspaper article and that he intervened
9 as "soon as [he] heard what the conversation was about." (Barber Depo. at 51.)
10 This testimony suggests that even though Juror Barber may not have internalized
11 the contents of the article, it is more likely than not that Juror Thornton discussed
12 the contents of the article when he announced that he read it.

13 **b. Analysis of Claim 4(A)(2)**

14 Petitioner has demonstrated that the jury was exposed to the contents of the
15 newspaper article that implicated him in the strangulation of two girls in an
16 unrelated case. The jurors learned this information after the guilt phase, but before
17 returning a penalty phase verdict. The Court must consider whether this
18 extraneous information had a substantial and injurious effect on the verdict.

19 First, petitioner has shown that the jury actually received the information.
20 Juror Thornton announced that he read the article implicating petitioner in the San
21 Miguel murders, and Jurors Bovee and Jasinski remember hearing about the
22 allegations made against petitioner in the jury deliberation room before they
23 reached a penalty phase verdict.

24 Second, the evidence strongly suggests that the jury learned about the
25 contents of the incriminating newspaper article on August 28th, or several days
26 before the penalty phase began. Accordingly, the jury knew about the information
27 for the entire penalty phase.

28 Third, the evidence does not demonstrate that the jurors discussed or

1 considered the allegations that petitioner committed similar murders during
2 deliberation. The only evidence that the jury could have considered or discussed
3 the evidence during deliberation is that of Juror Jasinski, who testified that one of
4 the women on the jury refocused the jury's attention on the case at hand when the
5 allegations came up. (Jasinski Depo at 12-13.) As discussed, however, the most
6 likely scenario based on the collective testimony of the jurors is that the jury
7 learned about the newspaper article and its contents on the day it appeared in the
8 paper and that this comment about focusing on the case at hand happened at that
9 time, which was not during deliberations. The extent to which the jury discussed
10 the article at all, even outside deliberations, seems minimal. (*See, e.g.*, Jasinski
11 Depo. at 75 (describing the commentary about the newspaper article as a "fleeting
12 comment.")) Fourth, as mentioned, the article came to the jury's attention before it
13 reached the penalty phase verdict.

14 In addition, the prejudicial statements about petitioner being a suspect in the
15 strangulation of two additional women did not appear ambiguously phrased. The
16 jurors who testified about the contents of the incriminating article seemed to have
17 the same understanding about the allegations against petitioner. Moreover, the
18 information in the article was not otherwise admissible or cumulative of other
19 evidence adduced at trial. While the trial court did attempt to ameliorate the
20 prejudicial effect of the article by questioning all the jurors about whether they
21 read the article or heard petitioner discussed, the trial court conducted an
22 inadequate examination. The trial court did not seem to know that any of the
23 jurors had mentioned or discussed the newspaper article in the jury room. The trial
24 court failed to ask Jurors Thornton and Bovee if they heard anything about the
25 article, and the questioning seemed to ask the jurors only if they heard petitioner
26 discussed, not if they heard mention of a newspaper article about him. In addition,
27 the parties have stipulated that petitioner is not a suspect in the strangulation
28 murder of the two girls in San Miguel, making the prejudicial impact of the

1 newspaper article quite marked.

2 As the Court stated in its order granting an evidentiary hearing on this claim,
3 the information contained in the incriminating newspaper article “was prejudicial
4 because Petitioner had just been convicted of strangling his victims in the instant
5 case.” (Evidentiary Hearing Order at 15.) Also, as stated in that order, “the jury
6 had this information throughout the pendency of the penalty phase, during which it
7 was instructed to consider whether aggravating circumstances, such as prior acts of
8 violence committed by petitioner, outweighed any mitigating evidence.” (*Id.*) For
9 that reason, the “extrinsic evidence that Petitioner was being charged with other
10 strangulation murders . . . was directly related to a material aspect of the case.”
11 (*Id.* (citing *See Rodriguez*, 125 F.3d at 744).

12 In evaluating prejudice, the Court does not consider whether the State
13 presented enough aggravating evidence to support the death verdict. *See Olivarez*,
14 292 F.3d at 950. Instead, the Court must ponder whether the jury’s exposure to the
15 *Independent Press Telegram* article, published in the interim between the guilt and
16 penalty phases, and which erroneously implicated petitioner in the strangulation of
17 two girls in an unrelated case, had a substantial and injurious effect on the verdict.
18 It did. Because of (1) the highly prejudicial nature of the newspaper article
19 implicating petitioner in two unrelated murders, similar to the ones for which the
20 jury had just found him guilty; (2) evidence showing that two jurors remember
21 learning about this article in the deliberation room after the guilt verdict, but
22 before the penalty verdict; and (3) the fact that petitioner did not commit the
23 murders linked to him in the April 28th article, this error likely had a substantial
24 and injurious effect on the penalty phase verdict. *See Rodriguez*, 125 F.3d at 745
25 (“Reversible error commonly occurs where there is a direct and rational
26 connection between the extrinsic material and a prejudicial jury conclusion, and
27 where the misconduct relates directly to a material aspect of the case.” (internal
28 quotation marks and citations omitted).

1 Accordingly, the Court GRANTS Claim 4(A)(2).

2 **c. Analysis of Claims 5(D)(18), 5(D)(24) & 5(D)(25)**

3 Relatedly, petitioner claims that trial counsel failed to locate the source of
4 the *Independent Press Telegram* article that falsely accused petitioner of unrelated
5 crimes in northern California. Petitioner also claims that trial counsel “failed to
6 take adequate steps to minimize the impact these fake reports had on the exposed
7 jurors who were unaware of the falsity of the reports.” (Pet. at 48.) In addition,
8 petitioner claims that at the end of the guilt phase, trial counsel failed to renew his
9 request to sequester the jury during the penalty phase. Petitioner also contends
10 that trial counsel failed to challenge several unnamed jurors, even though he knew
11 or should have known that they had been exposed to a prejudicial newspaper
12 article.

13 To obtain relief on these IAC claims, petitioner must show that counsel
14 performed deficiently and that this deficient performance prejudiced petitioner.
15 *Wiggins*, 539 U.S. at 521.

16 Petitioner cannot prevail on these claims. As discussed regarding Claim
17 4(A)(2), trial counsel moved for selection of a new penalty phase jury based on the
18 newspaper article. Trial counsel also successfully convinced the trial court to
19 question the jurors individually about the article. Based on that inquiry, the trial
20 court excused three jurors from service. Trial counsel, still concerned that Juror
21 Barber was exposed to the article, asked the trial court to question him yet again.
22 The trial court did so. While the trial court ultimately kept Juror Barber on the
23 jury, it was over the objection of trial counsel. Petitioner contends in Claim
24 5(D)(25) that trial counsel failed to challenge “several jurors even though he knew
25 or should have known that they had been exposed to th[e] prejudicial newspaper
26 article.” Petitioner does not name these jurors, and the record reflects that trial
27 counsel repeatedly, persistently and successfully sought to investigate and remedy
28 the jury’s exposure to the damaging article. Moreover, in Claim 5(D)(18),

petitioner points to counsel's alleged failure to look for the source of the article as deficient. Reasonable trial counsel could have concluded that adequate representation necessitated an attempt to look into and remedy the jurors' exposure to the article, but not an effort to locate the source of the article. Counsel's performance is not deficient because the trial court conducted an inadequate inquiry into the jurors' exposure to the newspaper article, or because some of the jurors may have been less than honest about their exposure to the article. Counsel performed adequately, given the circumstances and the information available to him. Claims 5(D)(18) and 5(D)(25) fail.

Finally, in Claim 5(D)(24), petitioner criticizes as deficient counsel's failure to renew his motion to sequester the jury at the end of the guilt phase. Reasonable counsel could have concluded that the trial court's earlier denial of a motion to sequester the jury made a renewed motion futile. *Rupe*, 93 F.3d at 1440 (holding that failure to take futile action is not ineffective). While sequestering the jury would have prevented the jury's exposure to the prejudicial newspaper article, petitioner cannot show a likelihood that the trial court would have granted a motion to sequester the jury. Petitioner's claim of deficiency is too speculative to support relief. *Cf. Cooks*, 660 F.2d at 740 (holding that petitioner's claim of prejudice amounted to "mere speculation").

Accordingly, the Court DENIES Claims 5(D)(18), 5(D)(24) and 5(D)(25).

3. Foreman's exposure to an allegation that petitioner committed an uncharged rape (Claim 4(A)(3))

In Claim 4(A)(3), petitioner contends that an alternate juror was approached by one of his tenants, and that tenant informed the alternate that petitioner had raped the tenant's mother. The tenant's mother identified petitioner when she saw his picture in the newspaper. Petitioner further contends that the alternate approached the foreman and relayed this conversation to him before the penalty phase concluded. Petitioner contends that this error prejudiced him at the penalty

1 phase.

2 The Court held an evidentiary hearing on this claim. The order granting an
3 evidentiary hearing stated the following:

4
5 In this case, Petitioner has alleged facts which, if proved, show
6 that he is entitled to relief. Petitioner was charged with raping and
7 murdering both of his victims. Petitioner claims that Juror Barber
8 was exposed to uncontroverted extrinsic evidence that Petitioner had
9 committed a previous rape. Evidence that a criminal defendant has
10 committed a prior similar offense is, by its nature, intrinsically
11 prejudicial and necessarily has a substantial and injurious effect on
12 the verdict. *Jeffries v. Wood*, 114 F.3d at 1491.

13 Moreover, evidence that Petitioner had committed a prior rape
14 was directly related to a material aspect of the case. *See Rodriguez v.*
15 *Marshall*, 125 F.3d at 744 (“Juror misconduct which warrants relief
16 generally relates ‘directly to a material aspect of the case’”) (citations
17 omitted). Prior to deliberations, the trial court instructed the jurors to
18 consider “the presence or absence of criminal activity by the
19 defendant which involved the use . . . of force or violence” in
20 deciding whether to sentence Petitioner to death. (RT 3682-84).
21 Whether Petitioner had committed a prior rape was evidence of
22 criminal activity involving the use of force or violence. Petitioner
23 also did not receive a hearing regarding this issue in state court.
24 Because Petitioner has alleged facts which, if true, would entitle him
25 to relief, and he was not afforded a full and fair hearing on this issue
26 in state court, this court grants Petitioner’s motion for an evidentiary
27 hearing regarding this claim.
28

(Evidentiary Hearing Order at 12-13.)

a. Relevant Facts

23 On January 3, 1990, alternate juror Edward Howard provided a declaration.
24 It stated, in part:

25
26 After the verdict of guilt had been entered, but prior to the
27 penalty phase, we, the jurors, met in the quad area near the courthouse
28 to celebrate that we were done with that part of the trial. It was a

1 major relief for everyone.⁹

2 It was at about this same time that one of my tenants
3 approached me and said that she had read the newspaper article. She
4 stated that her mother had seen the photograph of Mr. Hernandez in
5 the newspaper and knew that it was the man who had raped her at one
6 time. Shortly after this incident I mentioned the forgoing to the jury
7 foreman. At the get together in the quad area is when I made mention
8 of [it].¹⁰

9 (Reply Brief in Support of Petition for Writ of Habeas Corpus (filed in the
10 Supreme Court of the State of California), Exh. B (“Howard Decl.”) at 1-2, ¶¶ 3-
11 5.)

12 In addition, Juror Howard added the following hand-written paragraph to
13 the end of his declaration:

14 I remember that when I told the foreman what my tenant had
15 told me, I made sure to let him know that he was the only person
16 other than my wife whom I told about this and I also tried to explain
17 that I didn’t (did not) want to influence him and he assured me that by
18 the evidence the jury had been presented that something like this
19 would have *no* influence on his decision.

20 (Howard Decl. at 2.)

21 The parties deposed Juror Howard ten years after he provided his initial
22 declaration. The main issue at his deposition concerned when Juror Howard told
23 Juror Barber about the conversation with his tenant. Juror Howard repeatedly
24 testified that he told Juror Barber about the conversation with his tenant after the
25 guilt phase concluded—specifically, after the article appeared in the paper—but

26 ⁹ Juror Howard crossed out the next typed sentence, which read, “It was at that time that
27 we discussed a newspaper article implicating Mr. Hernandez in other murders.” (Reply Brief in
28 Support of Petition for Writ of Habeas Corpus (filed in the Supreme Court of the State of
California), Exh. B (“Howard Decl.”) at 1, ¶ 4.)

¹⁰ The last quoted sentence (“At the get together in the quad area is when I made mention of
[it]”) was hand-written by Juror Howard. He also crossed out a typed sentence that read,
“Though I do not believe that this incident influenced the jury’s decision, I cannot help but
wonder whether the penalty phase verdict would have been different had I not mentioned it.”
(Howard Decl. at 2, ¶ 5.)

1 before the jury reached a penalty verdict. (*See, e.g.*, Howard Depo. at 25 (“Q: So it
2 was—it was—the conversation you’ve told us about with Mr. Barber telling him
3 about the tenant and the tenant’s mother was, as I understand it, prior to the time
4 the jury went into deliberations to determine what penalty he receives?

5 A: Correct.”), 26 (“From my recollection, it occurred after he had been found
6 guilty, but prior to being sentenced—”), 26 (testifying that the conversation could
7 have happened on any of the days the jury heard penalty phase testimony), 40
8 (“The conversation between me and Mr. Barber took place after the article in *The*
9 *Press Telegram* and before the death penalty was returned.”), 41 (“I—I know that
10 a conversation took place between me and Mr. Barber. I know it was after the
11 article in *The Press Telegram*. As to what specific day or—that, I can’t say. I
12 know it was before he was sentenced—before the jury came back with the
13 sentence.”), 43 (“The conversation between me and Mr. Barber, I know it occurred
14 after Mr. Hernandez was found guilty and prior to his being found—or prior to his
15 being sentenced to death. ¶ Now, as far as which particular day, that, I’m sorry, I
16 can’t recall. But I know it was after he had been found guilty and prior to when he
17 was sentenced to death.”), 60 (“I believe that what took place was after the guilty
18 verdict had been rendered, we all met—we, the jury, got together in the—in a quad
19 area near the courthouse. We were relieved because we were done with a lot of
20 the trial. But this was prior to his being sentenced. Now, as of today, my exact
21 recollection as to when—whether this took place before any testimony was given
22 in the penalty phase or not, I’m not sure.”), 67 (“Well, I know I told him—I told
23 him during the trial about what one of my tenants had told me Well, I know I
24 told him during the trial near the courthouse about what the tenant had told me
25 about her mother being raped, and she was pretty sure that it was Hernandez that
26 had done it. I know that took place during the trial.”).

27 Juror Howard also testified that he was not sure when he told Juror Barber
28 that he (Juror Howard) was concerned that the conversation would influence Juror

1 Barber's decision about whether to vote for the death penalty. That portion of the
 2 conversation could have happened before or after the penalty verdict. (Howard
 3 Depo. at 21, 22-25, 44 ("The only part of the conversation with Mr. Barber that I
 4 have a question [about] is whether it took place at that time or after the trial
 5 was—whether I asked him whether that had influenced his decision or not."), 63
 6 ("[W]hether I told him . . . that I did not want to influence him—I'm not sure
 7 whether that took place when we were at the quad or whether that took place after
 8 the trial was completely over with."))

9 In addition, the parties deposed Juror Barber. Juror Barber could not
 10 remember the conversation with Juror Howard. (*See, e.g.*, Barber Depo. at 21 ("Q:
 11 Do you remember that at one of these get-togethers there was an alternate juror
 12 who told you that he was a landlord, and he had been confronted by a tenant who
 13 had told him that her mother had seen a picture of Hernandez in the newspaper and
 14 was convinced that Hernandez had raped her mother? A: I don't remember that at
 15 all.")). On further examination, Juror Barber offered testimony that while he could
 16 not remember the conversation, that did mean that it did not happen. (*Id.* at 40-41
 17 ("Q: Is it accurate that you told [petitioner's counsel] earlier this year that you
 18 could not say the conversation did not occur? A: Yes, that's right. Q: You just
 19 weren't sure one way or the other? A: That's an accurate statement. Q: And that's
 20 an accurate statement today? A: Yes.")). In addition, however, Juror Barber
 21 testified that if Juror Howard had talked to him about the tenant's allegation, he
 22 probably would have remembered it:

23
 24 Q: Now going back to this statement about the tenant, and
 25 you indicated that in a conversation with [petitioner's
 26 counsel] you had stated that you couldn't foreclose the
 possibility that that could have happened. Do you have
 any actual memory of that conversation?

27 A: Not at all.

28 Q: And do you have any actual memory of him later coming
 to you and saying, geez, I hope I didn't influence your

1 vote?

2 A: Not at all.

3 Q: And would that have been the type of conversation that
4 you think—in your present state of mind, do you think
5 that that would have been the type of conversation that
6 would have stood out?

7 A: Yes, it would. That was one of the things like the
8 newspaper, that if someone had said that to me that was
9 significant enough that I would have remembered it and
10 probably told the judge.

11 (Barber Depo. at 49-50.) Although Juror Barber testified that this conversation is
12 the kind that he would have remembered, he also admitted that while he knew that
13 Juror Wagner consulted her minister about how to vote in the penalty phase, he did
14 not think it was necessary to report that communication to the trial judge. (*Id.* at
15 15.) Additionally, Juror Barber testified that he reported to the trial court that
16 Juror Thornton read the newspaper article implicating petitioner in the double
17 strangulation of two girls in Northern California, but nothing in the record
18 indicates that he actually reported this incident. (*Id.* at 18 (“And then I wrote a
19 note to the bailiff to tell the judge that there was a problem.”).) The record does
20 not contain a note from Juror Barber to the trial court, nor does the transcript
21 suggest that he gave a note to the judge. Neither the trial judge nor the attorneys
22 mention such a note, and the voir dire conducted regarding the newspaper article
23 does not refer to a note from Juror Barber or to the incident in which Juror
24 Thornton announced that he read about petitioner in the paper. As discussed, the
25 questions on voir dire were directed more toward whether the jurors saw the
26 newspaper article rather than whether they heard a juror announce in the jury room
27 that he read such an article. These discrepancies raise questions about the
28 credibility of Juror Barber’s testimony. The Court need not determine Juror
Barber’s credibility, however, because the analysis of each of the juror misconduct

1 claims is essentially the same, regardless of the credibility determination.¹¹

2 The Court must reconcile the following evidence: (1) Juror Howard's
3 unyielding contention that he informed Juror Barber about the conversation Juror
4 Howard had with his tenant, in which the tenant accused petitioner of having raped
5 her mother and (2) Juror Barber's testimony (a) that he does not recall the
6 conversation with Juror Howard, (b) that even though he does not recall the
7 conversation, it still could have happened and (c) that if the conversation did
8 happen, it was "significant enough that [he] would have remembered it and
9 probably told the judge." (Barber Depo. at 50.) Respondent argues that petitioner
10 has failed to meet his burden of proof. He contends that Juror Barber's testimony
11 that he cannot remember the conversation with Juror Howard effectively cancels
12 out Juror Howard's recollection that the conversation occurred. He also points out
13 that Juror Howard's certainty in his memory that the conversation with Juror
14 Barber took place is of little consequence. Respondent's position is unavailing.
15 Juror Howard firmly remembers that he informed Juror Barber about the tenant's
16 allegation before the jury returned a penalty phase verdict. (*See, e.g.*, Howard
17 Depo. at 40, 41, 43.

18 Moreover, Juror Howard repeatedly testified that he has harbored guilt for
19 many years because he knew that his initial interaction with his tenant and his
20 subsequent conversation with Juror Barber violated the judge's admonition not to
21

22 ¹¹ The evidence concerning Claim 4(A)(1) that is attributable *only* to Juror Barber concerns
23 the exact timing of Juror Wagner's telling the jury that she consulted her minister over the
24 weekend. This evidence is not in dispute. The record makes plain that Juror Wagner consulted
25 her minister on Sunday after mass. The jury reconvened to deliberate the next day and returned
26 a verdict around lunchtime. Juror Wagner told her fellow jurors that she consulted her minister
27 sometime Monday morning. Depending on whether she shared this information at the start of
28 deliberations or toward the end, the jury had this information for a range of several minutes to
several hours. This timeframe makes little, if any, appreciable difference to the analysis.
Similarly, a negative credibility determination would not affect Claim 4(A)(2). Even without
deducing from Juror Barber's testimony that Juror Thornton probably discussed the contents of
the newspaper article, both Jurors Bovee and Thornton testified that they heard the contents of
the newspaper article discussed in the deliberation room after the guilt phase verdict but before
the penalty phase verdict. Juror Barber's testimony on that point is not required.

1 discuss the case outside deliberations and that these events were potentially
2 harmful to petitioner. (*See, e.g.*, Howard Depo. at 44 (“But the judge was very,
3 very specific about what we were supposed to do and not supposed to do, and he
4 was very, very firm. And I tried within—I tried as much as possible to abide by
5 the judge. I know I—this conversation has sat on my mind for a long time because
6 I know it was probably improper for me to do. But it did occur.”), 74 (“The fact
7 that I shared the information with the juror is what weighed on me. Because I felt
8 it was improper for me to do that, but it was done. There was nothing I could do
9 that’s going to retract it, but it was done. But I felt uncomfortable with that.”).
10 Petitioner has demonstrated by a preponderance of the evidence that Juror Howard
11 did in fact inform Juror Barber about the conversation with the tenant before the
12 jury returned its penalty phase verdict, given (1) the force of Juror Howard’s
13 unwavering testimony, (2) the strong feelings of guilt Juror Howard has harbored
14 since the trial because he knew that his conversations with both his tenant and
15 Juror Barber were improper and potentially prejudicial because they occurred
16 before the jury returned a penalty phase verdict and (3) the questions surrounding
17 Juror Barber’s memory of the events.

18 **b. Analysis**

19 The evidence shows that Juror Howard’s tenant told Juror Howard that
20 petitioner raped the tenant’s mother. The alleged victim recognized petitioner
21 when she saw his photo in the paper. Juror Howard adamantly remembers
22 recounting this conversation to Juror Barber after it occurred but before the penalty
23 phase concluded. Juror Barber does not remember the conversation.

24 Again, the Court must look to a constellation of factors to determine
25 whether Juror Barber’s exposure to an accusation that petitioner raped the mother
26 of one of Juror Howard’s tenants had a substantial and injurious effect on the
27 verdict.

28 As discussed, there is some dispute about whether Juror Barber actually

1 received the information that one of Juror Howard's tenants accused petitioner of
2 raping her mother. The sum total of the evidence shows, however, that it is more
3 likely than not that Juror Barber learned about Juror Howard's conversation with
4 his tenant, although Juror Barber did not remember it at his deposition in 2000.
5 Second, Juror Barber probably knew about the rape allegation for most or all of the
6 penalty phase. Third, the parties have not put forth any evidence that the jury
7 discussed or considered this rape allegation, and none of the jurors deposed in
8 2000 recalls discussing this issue in deliberations. Fourth, Juror Howard testified
9 repeatedly that he informed Juror Barber about the conversation with his tenant
10 before the jury reached a penalty phase verdict. The timing of his tenant's
11 confrontation with him, and his subsequent conversation with Juror Barber,
12 weighed on him for many years because he knew the conversations were
13 unauthorized communications that took place during trial and that could influence
14 the penalty phase verdict.

15 In addition, the accusation that petitioner raped the mother of one of Juror
16 Howard's tenants was not ambiguously phrased. The tenant seemed sure that
17 petitioner was the same man who raped her mother. The tenant's mother identified
18 petitioner based on a photo in the newspaper, close in time to the publication of the
19 article linking petitioner to two other murders. The accusation was not ambiguous.
20 Moreover, an unproven, unsubstantiated rape allegation with which petitioner was
21 never charged was not otherwise admissible or merely cumulative of other
22 evidence introduced at trial. Because neither the trial court nor the parties were
23 aware that Juror Howard had this communication with his tenant or that he shared
24 what he heard about petitioner with Juror Barber, the court did not give a curative
25 instruction or take any other step to ameliorate the prejudice to petitioner.

26 Finally, and most importantly, the rape allegation had the potential for great
27 prejudice, given the issues and evidence in the case. As stated in the Court's order
28 granting an evidentiary hearing, "[e]vidence that [petitioner] has committed a prior

1 similar offense is, by its nature, intrinsically prejudicial and necessarily has a
2 substantial and injurious effect on the verdict.” (Evidentiary Hearing Order at 12
3 (citing *Jeffries v. Wood*, 114 F.3d at 1491.)) Furthermore, and also as stated in the
4 Court’s order granting an evidentiary hearing, “evidence that [p]etitioner had
5 committed a prior rape was directly related to a material aspect of the case.”
6 (Evidentiary Hearing Order at 12 (citing *Rodriguez v. Marshall*, 125 F.3d at 744
7 (“Juror misconduct which warrants relief generally relates directly to a material
8 aspect of the case.”) (internal quotation marks and citations omitted)). As the
9 order granting the evidentiary hearing additionally stated, “Prior to deliberations,
10 the trial court instructed the jurors to consider ‘the presence or absence of criminal
11 activity by the defendant which involved the use . . . of force or violence’ in
12 deciding whether to sentence [p]etitioner to death.” (Evidentiary Hearing Order at
13 12 (citing RT 3682-84).) If petitioner had committed a prior rape, that certainly
14 would have been evidence of criminal activity involving the use of force or
15 violence.

16 Juror Barber received extraneous, prejudicial information that another
17 woman accused petitioner of raping her after seeing petitioner’s picture in the
18 paper. Petitioner stood trial for raping, sodomizing and murdering two women.
19 The jury heard extensive evidence about the rape allegations. Juror Barber voted
20 with the other jurors at the guilt phase to convict petitioner of rape, and the
21 circumstances of the crime, including the rapes, were an aggravating factor at the
22 penalty phase. During the penalty phase, the jurors were instructed to consider the
23 presence or absence of prior criminal acts involving force or violence.
24 Juror Barber’s exposure to this additional rape allegation had a substantial and
25 injurious effect on the verdict. The Constitution protects petitioner’s right to be
26 tried by twelve impartial jurors. While only Juror Barber was exposed to the rape
27 allegation, the Constitution guarantees petitioner’s right “to be tried by 12, not 9 or
28 even 10, impartial and unprejudiced jurors.” *Parker*, 385 U.S. at 366; *see also*

1 *Dyer*, 151 F.3d at 973; *Dickson*, 849 F.3d at 408.

2 Accordingly, the Court GRANTS Claim 4(A)(3).

3 **4. Jury's understanding of LWOP (Claim 4(A)(4))**

4 In Claim 4(A)(4), petitioner contends that the jury was informed and
5 believed that life without the possibility of parole ("LWOP") did not exclude the
6 possibility of parole, and, accordingly, several jurors voted for the death penalty in
7 order to foreclose the possibility of petitioner's release.

8 Petitioner cites to the declarations of two jurors and the deposition of a third
9 juror in support of this claim. As discussed, however, juror testimony impeaching
10 a verdict is inadmissible. *Tanner v. United States*, 483 U.S. 107, 116–27 (1987)
11 (discussing the prohibition on jury testimony to impeach a verdict); Fed. R. Evid. §
12 606(b). In fact, the Ninth Circuit has excluded juror testimony in a very similar set
13 of circumstances. *Belmontes v. Brown*, 414 F.3d 1094, 1124 (9th Cir. 2005), *rev'd*
14 *on other grounds by Ayres v. Belmontes*, 549 U.S. 7 (2006)); *McDowell v.*
15 *Calderon*, 107 F.3d 1351, 1365–68 (9th Cir.), *rev'd on other grounds by*
16 *McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997) (en banc). The only possibly
17 applicable exception to the prohibition on juror testimony to impeach a verdict,
18 which allows for evidence of "whether extraneous prejudicial information was
19 improperly brought to the jury's attention," does not apply. Fed. R. Evid. §
20 606(b)(1); *see also McDowell*, 107 F.3d at 1367 ("The type of after-acquired
21 information that potentially taints a jury verdict should be carefully distinguished
22 from the *general knowledge, opinions, feelings and bias that every juror carries*
23 *into the jury room.*") (emphasis added) (internal quotation marks and citation
24 omitted). The declarations appear to "reflect[] [the jurors'] belief[s] about the
25 consequences of the sentence of death and [their] motive in voting for it."
26 *McDowell*, 107 F.3d at 1368. Again, testimony "regarding the deliberative
27 process, the motives of individual jurors and conduct during deliberations is
28 inadmissible." *Id.* at 1367 (internal quotation marks and citations omitted).

1 Moreover, the trial court instructed the jury, among other things, that “[i]t is
 2 the law of [California] that the penalty for a defendant found guilty of murder of
 3 the first degree shall be death or confinement in the state prison *for life without*
 4 *possibility of parole* in any case in which the special circumstances charged in this
 5 case have been specially found to be true.” (14 RT 3681 (emphasis added).) The
 6 trial court also stated, “It is now your duty to determine which of the two penalties,
 7 death or confinement in the state prison *for life without possibility of parole*, shall
 8 be imposed on the defendant.” (14 RT 3684 (emphasis added).) The Court must
 9 presume that the jurors followed the instructions as given. *Francis v. Franklin*,
 10 471 U.S. 307, 324 n.9 (1985) (“[W]e adhere to the crucial assumption underlying
 11 our constitutional system of trial by jury that jurors carefully follow
 12 instructions.”). Petitioner has failed to demonstrate his entitlement to relief.

13 Accordingly, the Court DENIES Claim 4(A)(4).

14 **5. Jurors’ consideration of mitigating evidence (Claim**
 15 **4(A)(5))**

16 In Claim 4(A)(5), petitioner contends that several jurors believed they were
 17 required to impose the death penalty if they found petitioner guilty of two murders
 18 and, accordingly, those jurors did not consider any mitigating evidence.

19 In support of this claim, petitioner points to a juror declaration. As stated,
 20 the Court cannot consider juror testimony impeaching a verdict. *Tanner*, 483 U.S.
 21 at 116–27; Fed. R. Evid. § 606(b). Petitioner does not contend that the jury’s
 22 alleged misunderstanding of the law resulted from the jury’s exposure to
 23 extraneous prejudicial information improperly brought to its attention.
 24 Accordingly, no exception to Federal Rule of Evidence 606(b) applies.

25 Petitioner has failed to demonstrate his entitlement to relief. Accordingly,
 26 the Court DENIES Claim 4(A)(5).

1 **6. Juror Howes' consideration of mitigating evidence (Claim**
 2 **4(A)(6) & 4(B)(1))**

3 In Claim 4(A)(6), petitioner contends that Juror Viola Howes decided to
 4 vote for the death penalty at the end of the guilt phase and, therefore, did not
 5 consider any of the mitigating evidence presented at the penalty phase. Relatedly,
 6 in Claim 4(B)(1), petitioner contends that Juror Howes concealed material
 7 information at voir dire when she said that she would give both sides a fair and
 8 impartial trial based on the evidence presented, that she would keep an open mind
 9 and that she would follow the law as provided by the trial court because she later
 10 gave no consideration to the mitigating evidence presented at the penalty phase.

11 Again, petitioner attempts to rely on a juror declaration in support of this
 12 claim, and, again, juror testimony impeaching a verdict is inadmissible. *Tanner*,
 13 483 U.S. at 116–27; Fed. R. Evid. § 606(b). As with Claim 4(A)(5), petitioner
 14 does not allege that Juror Howe's failure to follow the instructions as given or to
 15 adhere to her oath as a juror had anything to do with her exposure to extraneous
 16 prejudicial information improperly brought to her attention. Thus, no exception to
 17 Federal Rule of Evidence 606(b) applies, and petitioner has again failed to
 18 demonstrate his entitlement to relief.

19 Accordingly, the Court DENIES Claims 4(A)(6) and 4(B)(1).

20 **7. Jury's consideration of the Bible (Claim 4(A)(7)(c))**

21 In Claim 4(A)(7)(c), petitioner contends that one or two Bibles were present
 22 in the jury room throughout deliberations and that the jurors discussed and
 23 considered the Bible in their deliberations. He argues that this consultation of the
 24 Bible during penalty phase deliberations prejudiced him.

25 Petitioner puts forth weak and inadmissible evidence that the jurors had a
 26 Bible in the deliberation room and that they actually consulted it. First, petitioner
 27 points to the declaration of Juror Viola B. Howes. Juror Howes' declaration states
 28 in relevant part:

1
2 I recall that Louise Wagner had considerable difficulty in
3 imposing the death penalty. During the deliberations, there was a
4 Bible present which I believe was brought into the jury room by
Mrs. Wagner. I recall statements having been made by Mrs. Wagner
regarding her plans to attempt to “save” Mr. Hernandez’[s] soul.

5 (Howes Decl. p. 2, ¶ 4.) Read most generously to petitioner, this declaration
6 states only that a Bible was in the deliberation room, but not that the jury looked at
7 or considered it.

8 Petitioner also alleges that religion played a large role in the trial,
9 compounding whatever error took place with respect to the Bible. One juror gave
10 defense counsel a Bible at the conclusion of the trial so that he could give it to
11 petitioner. (Wagner Decl. 1 at ¶ 5.) Another juror recalled that both Jurors
12 Wagner and Glenn held strong religious views. Specifically, Juror Wagner talked
13 of visiting petitioner to save him. Juror Glenn sent a short, written prayer into the
14 deliberation room to be read at the beginning of guilt phase deliberations each day
15 when she was an alternate, and she said a short prayer herself at the start of penalty
16 phase deliberations when she was a juror. (Lamont-Soliman Decl. at ¶¶ 5, 6.)

17 Petitioner argues, “Juror Glenn based her beliefs upon the teachings of the Bible,
18 and shared those beliefs during deliberations. Glenn believed in the Old
19 Testament teaching of ‘an eye for an eye and a tooth for a tooth.’” (Petr’s 8/23/07
20 Brief at 11.) As support for his characterization of Juror Glenn, petitioner cites to
21 the declaration of J. Bruce Robertson, one of his attorneys on federal habeas.
22 (Petition for Writ of Habeas Corpus (filed in California Supreme Court), Exh. J, at
23 8.) That declaration describes a conversation that an investigator had with Juror
24 Glenn, as relayed by the investigator to the attorney. (*Id.*) Petitioner relies on
25 quadruple hearsay, and no exception applies. Finally, petitioner points to the
26 record to show that the prosecutor referred to religion at least eight times in his
27 closing argument. (Petr’s 8/23/07 Brief at 11.) However, petitioner falls far short
28 of showing by a preponderance of the evidence that the jury considered the Bible

1 in its deliberations. *See Johnson v. Zerbst*, 304 U.S. 458, 468 (1938) (applying the
 2 “preponderance of the evidence” standard to an IAC claim on habeas), *overruled*
 3 *on other grounds by Edwards v. Arizona*, 451 U.S. 477 (1981).

4 Even if the Court were to presume that a Bible was present in the jury
 5 deliberation room at the penalty phase *and* that the jurors consulted the Bible,
 6 petitioner likely cannot make a showing of substantial and injurious influence on
 7 the penalty phase verdict. Looking to the *Jeffries* factors, petitioner has not shown
 8 that the jurors actually consulted the Bible, nor did he provide a time-frame for
 9 how long the jury would have reviewed the Bible or the extent to which the jurors
 10 discussed or considered it. *See Jeffries* 114 F.3d at 1492. Moreover, petitioner has
 11 not shown what Biblical text the jury consulted, let alone whether it was
 12 ambiguously phrased. The passages from the Bible, if the jury actually consulted
 13 any, certainly were not otherwise admissible, nor cumulative of other evidence
 14 introduced at trial. The trial court obviously did not issue a curative instruction or
 15 take an alternate step to ameliorate the prejudice because it was not aware of the
 16 jury’s alleged consultation of the Bible. *See id.* at 1491-92. While some of the
 17 factors suggest that consultation of the Bible may have caused some prejudice to
 18 petitioner, he has failed to show that the effect would have been substantial or
 19 injurious. *See, e.g. Fields*, 503 F.3d at 779-83 (holding that an individual’s
 20 consultation of the Bible, which he used to create a list of reasons “for” and
 21 “against” the death penalty that he shared with his fellow jurors during the penalty
 22 phase deliberations, did not have a substantial and injurious influence in
 23 determining the jury’s verdict).

24 Accordingly, the Court DENIES Claim 4(A)(7)(c).

25 **8. Jurors’ confrontation by victims’ families outside**
 26 **courtroom (Claim 4(A)(8))**

27 In Claim 4(A)(8), petitioner contends that members of the victims’ families
 28 confronted jurors in the hallway, telling them to vote for the death penalty. He

1 argues that this encounter caused him prejudice.

2 The trial court held a hearing on this incident. During the guilt phase,
3 Juror Thornton told the bailiff that a woman approached him and asked him which
4 side he was on. (11 RT 2760.) The trial court questioned Juror Thornton, who
5 stated:

6 Well, as I was standing outside waiting for the—the door was
7 closed here, so we was waiting for someone to open the door to the
8 right, so the lady came up and she says—asked me which side I was
9 on, and I say, “I’m not supposed to say anything. You know, not
10 supposed to talk.” ¶ So then [Juror Thornton] told her, says, “We
11 not supposed to say anything to anyone.” ¶ And then she said that, “I hope
12 that—” let’s see. How did she say that?—I—maybe he can think of it, but
13 she said something that she hope he gets the maximum or something. I
14 don’t know.

15 (11 RT 2798-99.) Juror Thornton testified that the woman’s statement did not
16 intimidate him. (11 RT 2799.) He also testified that the encounter would not
17 affect his decision and that he could disregard the woman’s comments. (11 RT
18 2800.)

19 The trial court also questioned Juror Howard, an alternate. He testified:

20 I was standing there and we were talking, and a lady
21 approached [Juror Thornton], and I didn’t really hear the discussion,
22 but I heard her ask—I did hear her, and after a couple of minutes
23 there, I heard her ask him what his opinion was, how he felt about it,
24 and I could tell he was trying to back off of it. ¶ He’s a quiet person,
25 anyhow, and he was trying to get away from it, and I just—I spoke
26 up. I told her—I says, “We are not allowed to talk about it,” and she
27 backed off. ¶ Then somebody else said—another woman that was
28 there said, “Yeah, they are jurors. They think they are better than
everybody,” and about that time, I knocked on the door so we could
get into the jury room, because the courtroom was locked and that
door was locked. I knocked on the door, and the typists in there let us
in, and I called everybody that was waiting over here at the doorway
over, and we all went in.

29 (11 RT 2802-03.) Juror Howard also testified that the exchange would not affect
30 his ability to be fair and impartial and that he had “no problem” with deciding the
31 case solely on the evidence produced at trial. (11 RT 2803.) When asked whether
32 he could “put [it] out of his mind,” he said, “I don’t know about putting it out of

1 my mind, but as far as the case, I can decide the case on the evidence that's here."
2 (11 RT 2804.)

3 The trial court also inquired of Juror Bovee:

4 [T]his lady just came up—there was two ladies, and they just
5 came walking up, and she said to me, "Do you know where the
6 Hernandez trial is?" and I just pointed to the door. ¶ So then she said
7 to me—she says, "I hope he gets the chair." ¶ So with that, I turned
8 my back to her and walked away, and then she came over and said she
9 was sorry, so I turned my back to her again, and then there was other
10 members of the jury came up and I went on in with them.

11 (11 RT 2807.) She then testified that the woman's statements did not intimidate
12 her and that she could give both sides a fair and impartial trial. (11 RT 2807-08.)

13 Finally, the trial court questioned the two women who made the statements
14 to the jurors. (11 RT 2809-17.) The trial court also informed them that if they
15 spoke to the jurors again, the trial court would fine or incarcerate them. (11 RT
16 2814, 2816-17.)

17 The Court must look to the many factors already discussed to evaluate the
18 potential prejudice from the women's statements that they hoped petitioner would
19 receive the death penalty and that the jurors thought they were better than
20 everyone else. The jurors actually received the information, as demonstrated by
21 the trial court's inquiry into the matter. The trial court excused Jurors Thornton
22 and Bovee before the penalty phase because they were exposed to the newspaper
23 article implicating petitioner in two unrelated murders. Juror Howard, an
24 alternate, never deliberated at either phase. Therefore, the jurors had the
25 information from the point the statements were made during the guilt phase
26 through the guilt phase deliberations. While the jurors received the information
27 before they reached a guilt phase verdict, petitioner has not produced evidence to
28 suggest that the jurors discussed or considered the statements made to Jurors
Thornton, Howard and Bovee. In addition, the statements were not ambiguously
phrased, nor did they comprise otherwise admissible or cumulative evidence.

1 While the trial court did not give a curative instruction, it did question the jurors
 2 exposed to the statements to determine what effect, if any, the encounter would
 3 have on the jurors' ability to decide the case fairly. The trial court also
 4 admonished the two women who made the statements and threatened them with
 5 either incarceration or fines if they talked to the jurors or if they discussed the case
 6 in front of them. This admonishment did not serve to ameliorate the statements
 7 already made, but would potentially guard against future statements made by the
 8 same individuals.

9 The statement about the jurors thinking they were "better than everybody"
 10 seems insufficiently prejudicial to have any effect on the outcome of the trial. The
 11 statement that one of the women hoped petitioner "got the chair," could have had a
 12 prejudicially influenced the penalty phase verdict. However, the three jurors all
 13 testified—and the trial court implicitly found that testimony credible—that the
 14 statement did not intimidate them, that it would not influence the proceedings and
 15 that it would not cause them to act unfairly or partially. In addition, the statement
 16 about the electric chair most likely would have influenced the penalty phase, but
 17 none of the jurors who heard the statement deliberated at the penalty phase. It
 18 appears that the statements, while potentially prejudicial, did not have a substantial
 19 or injurious effect on the verdict. An error that does not have a substantial and
 20 injurious effect on the outcome of the trial is deemed harmless. *Eslaminia*, 136
 21 F.3d at 1237 (citing *Bonin*, 59 F.3d at 824).

22 Accordingly, the Court DENIES Claim 4(A)(8) on the merit.

23 **E. Other Claims**

24 **1. Prosecutor's argument concerning age and religion (Claims** 25 **7 & 5(D)(28))**

26 In Claim 7, petitioner argues that the trial court's penalty phase instructions,
 27 coupled with the prosecutor's closing argument, improperly permitted the jury to
 28 consider petitioner's age at the time of the crime and his religious beliefs as

1 aggravating factors. He contends that the jury therefore considered
2 constitutionally impermissible factors as aggravating evidence. In addition,
3 petitioner contends that trial counsel's failure to object to the prosecutor's
4 argument concerning age and religion resulted in IAC.

5 **a. Age**

6 Petitioner alleges that the prosecutor argued that petitioner's age could be an
7 aggravating factor by categorizing life without parole as the more severe penalty
8 because petitioner would spend so many years in prison because he was eighteen
9 at the time of the crimes. Petitioner takes the position that age should be viewed
10 solely as mitigating. Petitioner also argues that factor (I) is constitutionally
11 overbroad and void for vagueness as applied in this case.

12 California Penal Code Section 190.3 is California's death penalty statute. It
13 lists eleven factors that a jury must take into account in determining whether the
14 appropriate punishment in a death-eligible case is the death penalty or life
15 imprisonment without the possibility of parole. Factor (I) concerns "the age of the
16 defendant at the time of the crime." Cal. Penal Code § 190.3(I).

17 The prosecutor listed all of the factors listed in Section 190.3 during his
18 closing argument. After doing so, the prosecutor stated:

19
20 Now, those are the guidelines and the factors by which we tell
21 our representatives of our community that they are to decide in a
22 particular case the choise [*sic*] to make between life without parole or
23 the death penalty.

24 Viewing these various factors, one can see that, from the
25 different philosophical, religious or moral view, one can consider a
26 factor in aggravation or a factor in mitigation. It's up to the jury, the
27 representatives of this community, to decide that.

28 For example, age. Some people would say that, "Oh, the
 person is young. He should not be killed. That would be too much of
 a cruel and inhuman punishment for someone so young."

 Another point of view or philosophy would be to lock one who
 is young up for the rest of their life without the possibility of parole
 would be too cruel and inhuman to make a person suffer for that long.

1 Another way of viewing age could be the person who is
 2 elderly, who commits a crime under the conditions in which the
 3 ultimate penalty can be imposed, if the person doesn't have much
 4 longer to live. The time in which is left to change that individual so
 5 that he can become a contributing, albeit in prison, member of society
 6 is too short to change, and, therefore, kill him; or a person who is
 7 elderly doesn't have that long to live anyway. Don't kill him.

8 Whether his age is a factor in mitigation or aggravation really
 9 depends on a philosophical view, religious or cultural background.

10 (14 RT 3633-34.)

11 The Supreme Court has rejected a void-for-vagueness challenge to factor
 12 (I). *Tuilaepa v. California*, 512 U.S. 967 (1994). In *Tuilaepa*, the petitioner
 13 argued that "the age factor is equivocal and that in the typical case the prosecution
 14 argues in favor of the death penalty based on the defendant's age, no matter how
 15 old or young he was at the time of the crime." *Tuilaepa*, 512 U.S. at 977. The
 16 Court rejected the petitioner's challenge:

17 It is neither surprising nor remarkable that the relevance of the
 18 defendant's age can pose a dilemma for the sentencer. But the
 19 difficulty in application is not equivalent to vagueness. Both the
 20 prosecution and the defense may present valid arguments as to the
 21 significance of the defendant's age in a particular case. Competing
 22 arguments by adversary parties bring perspective to a problem, and
 23 thus serve to promote a more reasoned decision, providing guidance
 24 as to a factor jurors most likely would discuss in any event. We find
 25 no constitutional deficiency in factor (I).

26 *Tuilaepa*, 512 U.S. at 977.

27 Petitioner does not just challenge factor (I) as vague on its face but as
 28 unconstitutionally vague and overbroad as applied to his case. A review of the
 record, however, does not show any significant differences between what
 petitioner argues here and what the petitioner argued in *Tuilaepa*. As the Supreme
 Court held in *Tuilaepa*, the prosecutor presented valid arguments about how the
 jury could view petitioner's age in this case in an attempt to give the jury
 perspective on how to view the factor. 512 U.S. at 977. Petitioner has failed to
 demonstrate that factor (I) was either unconstitutionally overbroad or vague as

1 applied to his particular case.

2 Moreover, the ultimate question the Court must answer in evaluating the
3 effect of the prosecutor's argument is not whether "the prosecutor's remarks were
4 undesirable or even universally condemned," but "whether the prosecutor's
5 comments so infected the trial with unfairness as to make the resulting conviction
6 a denial of due process," *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). It does
7 not appear that the prosecutor's argument deprived the petitioner of a fair trial
8 pursuant to this standard. The prosecutor's argument about age "did not
9 manipulate or misstate the evidence, nor did it implicate other specific rights of the
10 accused such as the right to counsel or the right to remain silent." *Darden*, 477
11 U.S. at 182. As the Supreme Court has held, the age of a defendant at the time of
12 the crime can pose a dilemma to the sentencer, but the prosecutor did not urge the
13 jury to consider age only as an aggravating factor. Nor did the jury instructions do
14 so. The prosecutor's argument that petitioner's age might influence the jury's
15 penalty verdict in several different ways was not improper and, therefore, did not
16 infect the trial with unfairness.

17 Accordingly, the Court DENIES this portion of Claim 7.

18 **b. Religious views**

19 Petitioner contends that the prosecutor impermissibly encouraged the jury to
20 consider petitioner's religious beliefs as a factor in favor of the death penalty.

21 During the penalty phase, petitioner's mother testified about petitioner's
22 religious beliefs. Her testimony proceeded as follows:

23
24 Q: And now you are asking the jury in this case now to save the
life of your son is that correct?

25 A: Yes.

26 Q: And do you feel that your son has some good things that he can
27 contribute, even if he is in prison for the rest of his life?

28 A: Yes.

1 Q: And you feel that he might have an opportunity to be saved?

2 A: Yes.

3 Q: In other words, saved by—from his religious or his religious
4 scruples may save him, is that correct?

5 A: Yes.

6 Q: So he might have an opportunity to go to some place in the
hereinafter, is that correct?

7 (13 RT 3349.) The prosecutor used that testimony during his closing argument to
8 suggest that petitioner's religious beliefs were not a reason to spare his life and
9 exercise mercy. Instead, the prosecutor argued, a death sentence would not
10 prevent petitioner from being saved and that it actually might give him a definitive
11 time during which he could repent and make peace with God. Specifically, the
12 prosecutor argued:

13
14 Or you have a variety of philosophies, religious point of view
15 of there is a life after death, as expressed by his mother . . . ¶ From
16 that point of view, religious view of a life hereafter, whether it be
17 reincarnation or Heaven or Hell, whatever it's termed, we all know at
18 least one thing, we're going to die some day. It's just a question of
19 when. ¶ It's just a question of what frame of mind and spirit we're in
20 when we die. ¶ Is it going to come unexpectedly when we have no
choice, perhaps at a given moment as to what condition we're in? ¶
Is it going to be when we know we're going to die, we can know the
exact moment, and if you wish to make peace, you can do so? And if
you don't, so be it. It's your choice. ¶ I urge you, ladies and gentleman of the jury, that
this defendant, there is no reason not to impose the death penalty.

21 (14 RT 3650-51.)

22 The California Supreme Court considered and rejected this claim on direct
23 appeal:

24
25 Defendant objects to the prosecutor's reference to defendant's
26 religion. He argues that the prosecutor was making the "subtle
27 argument" that perhaps because of defendant's religious beliefs, death
28 would be a preferable penalty. We do not agree. The prosecutor's
discussion of this subject was certainly not gratuitous, as defendant's
adoptive mother had testified that her son's life should be spared
because he had "some good things that he can contribute, even if he is
in prison for the rest of his life." She agreed with defense counsel's

1 suggestion that defendant might be “saved” due to his religious
2 principles, but the context was in terms of life without possibility of
3 parole, not death. The prosecutor’s remarks responded to this
4 argument in mitigation by asserting, in essence, that defendant’s
5 religious beliefs might save him anyway, and hence defendant’s
6 alleged religious beliefs did not constitute a reason not to impose the
7 death penalty. The prosecutor certainly did not argue religion as an
8 aggravating factor of itself militating in favor of the death penalty.

9 *Hernandez*, 47 Cal. 3d 363 (internal citations omitted).

10 The jury was instructed pursuant to California Penal Code Section 190.3,
11 which lists the factors the jury must take into account in considering whether to
12 impose the death penalty or life in prison. (3 CT 682-83 (CALJIC No. 8.84.1,
13 tracking California Penal Code Section 190.3)) Petitioner’s religious beliefs are
14 not a statutorily enumerated aggravating factor in Section 190.3.

15 The most charitable reading of petitioner’s claim is that the prosecutor
16 argued that religion was an aggravating factor *and* that petitioner did not do
17 anything to open the door to this characterization. Because religion does not
18 appear as a factor listed in 190.3, the prosecutor’s argument that the jury should
19 view petitioner’s religious beliefs as an additional, non-statutory aggravating
20 factor would constitute impermissible or improper argument. Petitioner’s
21 contention fails.

22 First, the transcript does not reflect that the prosecutor argued that
23 petitioner’s religious beliefs were an aggravating factor. Instead, the record shows
24 that the prosecutor argued that the jury could view petitioner’s religious beliefs as
25 a mitigating factor but still decide that the death penalty did not prevent petitioner
26 from being saved. In other words, the jury could view petitioner’s religious
27 convictions and his desire for repentance as mitigating, but could still vote for the
28 death penalty because the death penalty by itself would not act as an impediment
to petitioner being saved. *See Hernandez*, 47 Cal. 3d 363 (“The prosecutor
certainly did not argue religion as an aggravating factor of itself militating in favor
of the death penalty.”).

Second, and more definitive, petitioner opened the door to the prosecutor’s

1 argument about religion by putting on his mother's testimony. Petitioner put his
2 mother on the stand to testify that petitioner's religious convictions qualified as
3 mitigating pursuant to factor (k). Cal. Pen. Cod § 190.3 (k) ("Any other
4 circumstance which extenuates the gravity of the crime even though it is not a
5 legal excuse for the crime.") The line of questioning that defense counsel engaged
6 in with petitioner's mother shows that petitioner meant his mother's testimony to
7 provide the jury with an additional reason to spare his life: his religious beliefs.
8 (13 RT 3349.) The prosecutor's argument, therefore, appears to qualify as a
9 proper rebuttal to the mitigating evidence petitioner presented during the penalty
10 phase. *See People v. Rundle*, 43 Cal. 4th 76, 192 (2008) ("No misconduct
11 occurred [T]he prosecutor's comment constituted proper rebuttal to the
12 character evidence presented by the defense in mitigation, and not a suggestion
13 that this was an aggravating factor."), *overruled on other grounds by People v.*
14 *Doolin*, 45 Cal. 4th 390, 421 n.22 (2009) Petitioner fails to cite to any
15 case—federal or otherwise—that would support a different conclusion.

16 Even if the prosecutor erred by attempting to re-characterize petitioner's
17 mitigating testimony about his religious beliefs, the Court again must determine
18 whether the prosecutor's argument so infected the trial with unfairness that it
19 resulted in a denial of petitioner's due process rights. *Darden*, 477 U.S. at 181.
20 As with the prosecutor's argument concerning petitioner's young age at the time of
21 the crime, the prosecutor did not deprive petitioner of a fair trial. The prosecutor's
22 statement to the jury that a death sentence would not prevent petitioner from being
23 saved "did not manipulate or misstate the evidence." *Darden*, 477 U.S. at 182.
24 The prosecutor offered the jurors a way to acknowledge or even accept petitioner's
25 religious views but still vote for the death penalty. Because the prosecutor appears
26 to have engaged in a proper rebuttal argument, petitioner cannot establish that the
27 argument infected his trial with unfairness, and, accordingly, petitioner did not
28 suffer a denial of his due process rights.

1 Accordingly, the Court DENIES this portion of Claim 7.

2 **c. IAC (Claim 5(D)(28))**

3 Petitioner argues that trial counsel failed to object to the prosecutor's
4 argument that age and religion could be viewed as aggravating or mitigating.

5 To bring a successful IAC claim, petitioner must show that counsel
6 performed deficiently and that this deficient performance prejudiced petitioner.
7 *Wiggins*, 539 U.S. at 521.

8 Petitioner has failed to show deficiency with respect to counsel's failure to
9 object to the prosecutor's argument about either age or religion. As discussed, the
10 prosecutor did not err in arguing that petitioner's age could qualify as either an
11 aggravating or a mitigating factor, nor did he err in arguing in rebuttal that the jury
12 could accept petitioner's religious beliefs as a mitigating factor but still vote in
13 favor of the death penalty. Petitioner cannot show that counsel performed
14 deficiently by failing to object to the prosecutor's argument, when that argument
15 was not erroneous. Even if the Court were to presume that counsel performed
16 deficiently by failing to object to the prosecutor's argument, petitioner has failed
17 to make any showing of prejudice related to counsel's failure to object.

18 Accordingly, the Court DENIES Claim 5(D)(28).

19 **2. Prosecutor's argument regarding the "ultimate penalty"**
20 **(Claims 8 & 5(D)(29))**

21 In Claim 8, petitioner contends that the prosecutor improperly argued that
22 the jury could decide that life imprisonment was the ultimate penalty, an argument
23 which minimized the jury's sense of responsibility. Accordingly, the jury imposed
24 the death penalty in an arbitrary and capricious manner and deprived petitioner of
25 his right to a fair, reliable and non-arbitrary penalty phase verdict. Relatedly, in
26 Claim 5(D)(29), petitioner contends that trial counsel failed to object to the
27 prosecutor's argument that life without possibility of parole, rather than death, was
28 the ultimate penalty.

1 **a. Prosecutor's argument**

2 In his closing argument, the prosecutor stated the following:

3 In this society, we have set up a condition or sanction that if
4 you take another person's life under certain conditions, that sanction
5 will be the ultimate penalty. Now, I say ultimate penalty because the
6 problem with our society is we come from such diverse cultural
7 backgrounds, philosophical backgrounds, religious backgrounds and
8 theoretical backgrounds that we can't decide what is the ultimate
9 penalty for taking another person's life under certain conditions.

10 There are those in our society that believe, if you take another
11 person's life, you pay for it with your life: a tooth for a tooth, an eye
12 for an eye. There are those that, for whatever reasons, feel that
13 perhaps the ultimate penalty is torture, locking somebody up as an
14 animal in a cage for the rest of their life.

15 It varies depending on your philosophy, depending upon your
16 background, your cultural background, your religious attitudes, your
17 religious views. All of those things vary.

18 That's our problem in society, is we cannot decide what is the
19 ultimate penalty, but what our society, our community has done, has
20 said, that taking into consideration our various views, philosophies,
21 religious backgrounds, we at least can decide that the ultimate penalty
22 is either death or locking a person up in a cage for the rest of their
23 life, in prison without possibility of parole for the rest of their life.

24 Now in setting up these rules of society, our society, our
25 community has decided that the person or persons that will enforce
26 that sanction will be the community itself, ala the jury members, the
27 people selected from the community.

28 Now, because we have a vast variety of backgrounds in what is
29 the ultimate penalty, we have, and you will notice, in voir dire
30 eliminated those on the extremes, those that will say, "If you kill, you
31 die," or those that say, "I will never kill." We have attempted to bring
32 within our definition of ultimate penalty those persons that will view
33 society's ultimate penalty from various points of view and not
34 automatically decide which within those ultimate penalties will be
35 imposed.

36 So we have selected, presumably, as best we can, a cross
37 section of the members of our community, twelve jurors coming from
38 various walks of life, various cultural backgrounds, various
39 philosophical backgrounds, various religious backgrounds in order to

1 decide this.

2 Now, society has stated that our ultimate penalty will satisfy
3 our conditions of punishment, protection of society, because, if you
4 lock a person up or you kill them, society will be protected.

(14 RT 3625-28.)

5 Petitioner relies on *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985), in
6 support of his position. He cites it to suggest that the prosecutor erred in arguing
7 to the jury that a life sentence without the possibility of parole, rather than a death
8 sentence, might be the ultimate penalty. In fact, *Caldwell* does not stand for that
9 proposition. In *Caldwell*, the Supreme Court held that the prosecutor erred by
10 implying to the jury that it was not making the ultimate decision to sentence a
11 defendant to death because an appellate court would review the decision. *Id.* The
12 Court held that “it is constitutionally impermissible to rest a death sentence on a
13 determination made by a sentencer who has been led to believe that the
14 responsibility for determining the appropriateness of the defendant’s death rests
15 elsewhere.” *Id.* The holding in *Caldwell* differs markedly from the situation
16 petitioner challenges here: the prosecutor’s argument that life imprisonment,
17 rather than a death sentence, may be the ultimate penalty. Petitioner has not
18 pointed to any source of law prohibiting or even questioning the prosecutor’s
19 argument that life in prison might be the ultimate penalty.

20 Even if the Court presumes error, petitioner cannot obtain relief unless the
21 prosecutor’s argument so infected the trial with unfairness that it resulted in a
22 denial of petitioner’s due process rights. *Darden*, 477 U.S. at 181. Petitioner has
23 failed to show how the prosecutor’s argument was so unfair that it violated his due
24 process rights. In fact, petitioner’s briefing on this claim includes only one
25 sentence with a citation to *Caldwell v. Mississippi*, a case that is not on point.
26 (Petr’s 8/23/07 Brief at 51.) Petitioner states only that the prosecutor erred by
27 arguing that life imprisonment may be the ultimate punishment, and he excludes
28 any discussion of prejudice in his briefing. Given the circumstances of the crimes,

1 it seems unlikely that the prosecutor's argument about life imprisonment had any
2 appreciable affect on the outcome of the penalty phase.

3 Accordingly, the Court DENIES Claim 8.

4 **b. IAC**

5 In addition to his claim that the prosecutor erred in arguing that death is the
6 ultimate punishment, petitioner also brings an IAC claim, alleging that counsel
7 "failed to object to the prosecutor's argument that life without possibility of
8 parole, rather than death, was the ultimate penalty." (Pet. at 51.) Petitioner's IAC
9 claim fails.

10 Again, petitioner must show deficiency and prejudice. *Wiggins*, 539 U.S. at
11 521. Petitioner has failed to establish either.

12 Petitioner has not shown that the prosecutor erred by arguing that life
13 without parole may be the true ultimate penalty in this case, and, as discussed, his
14 reliance on *Caldwell* in order to make that point is misplaced. Petitioner's IAC
15 claim based on counsel's failure to object to the prosecutor's argument, which
16 petitioner has not shown was erroneous, likewise fails. It would be very difficult
17 for petitioner to establish that counsel performed deficiently by failing to object to
18 a line of argument that was not erroneous. Even if the Court presumed that the
19 prosecutor erred by making such an argument, and, therefore, that trial counsel
20 erred by failing to object to that line of argument, petitioner has not shown by a
21 reasonable probability that but for counsel's failure to object, the jury would have
22 voted for life without parole. In fact, objecting to the prosecutor's line of
23 argument may have called more attention to the prosecutor's argument about the
24 relative severity of the two punishments. Even if it did not bring unwanted
25 attention to the prosecutor's argument, petitioner has not argued convincingly that
26 counsel's objection to the argument, which the trial court may have overruled,
27 would have overcome the aggravating evidence in this case.

28 Accordingly, the Court DENIES this portion of Claim 5(D)(29).

1 **3. Prosecutor’s argument about aggravating and mitigating**
 2 **factors (Claim 11(1)-(2))**

3 In Claims 11(1) and 11(2), petitioner alleges that the prosecutor improperly
 4 argued that the factors set forth in subsections (a) through (k) of California Penal
 5 Code Section 190.3 could be considered aggravating or mitigating. Petitioner
 6 argues that factors (d) through (k) can only be mitigating pursuant to California
 7 law. Relatedly, in Claim 5(D)(28), petitioner brings an IAC claim based on trial
 8 counsel’s failure to object.

9 Petitioner contends that “the prosecutor urged the jurors to apply their own
 10 subjective definition of aggravation and mitigation, based on their philosophical or
 11 religious views and cultural backgrounds.” (Petr’s 2/1/08 Brief at 7.) As
 12 discussed, the Court is not called upon to evaluate whether “the prosecutor’s
 13 remarks were undesirable or even universally condemned.” *Darden*, 477 U.S. at
 14 181 (internal quotation marks and citation omitted). Rather, the relevant inquiry is
 15 “whether the prosecutor’s comments ‘so infected the trial with unfairness as to
 16 make the resulting conviction a denial of due process.’” *Id.* at 181 (quoting
 17 *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Petitioner cannot show
 18 that the prosecutor’s closing argument denied him a fair trial. *See Darden*, 477
 19 U.S. at 182 (holding that the prosecutor’s argument did not manipulate or misstate
 20 evidence, nor did it implicate other specifically enumerated rights of the accused).
 21 First, petitioner’s characterization of the prosecutor’s argument is questionable.
 22 In the portions of the record cited to by petitioner, the prosecutor only discusses
 23 factor (I), which relates to age. (14 RT 3633-34; *see also People v. Hernandez*, 47
 24 Cal. 3d at 364 (describing the challenged portions of the prosecutor’s closing
 25 argument as discussing only age and finding “no reasonable probability that any
 26 potential error in the prosecutor’s remarks affected the jury’s sentencing
 27 decision”); Claim 7, *supra*, (denying petitioner’s claims challenging prosecutor’s
 28 argument regarding age and religion)). In addition, a review of the transcript

shows that the prosecutor did not catalogue each factor in the statute and then argue that the jury should consider the absence of evidence for any of those factors as aggravating. Nor did the prosecutor suggest that the jury should consider a particular mitigating factor aggravating. Moreover, the instructions given at trial properly directed the jury's discretion at sentencing. (*See infra* Discussion of Claims 11(3)-11(5).) Petitioner's related IAC claim challenging counsel's failure to object to the prosecutor's argument cannot prevail. Because the prosecutor's argument did not violate petitioner's constitutional rights, trial counsel cannot be deficient for failure to object to the argument. Even if the Court presumed deficiency, petitioner has made no showing of prejudice. By extension, the failure to object to permissible or proper argument cannot form the basis of an IAC claim. *Cf. United States v. Bosch*, 914 F.2d 1239, 1247 (9th Cir. 1990) (holding that failure to object to admissible evidence was not unreasonable or prejudicial).

Accordingly, the Court DENIES Claims 11(1), 11(2) and 5(D)(28).

4. Jury instructions regarding the absence of evidence (Claims 11(3)-(5))

In Claims 11(3) through 11(5), petitioner alleges that the trial court erred in failing to instruct the jury that the absence of evidence as to any factor rendered that factor irrelevant. In other words, petitioner claims that the prosecutor's argument that all of the factors could be aggravating or mitigating, challenged in Claim 11(1) and 11(2), was exacerbated by the absence of an instruction stating that the lack of evidence on any factor rendered that factor irrelevant rather than aggravating.

The following instruction was given at trial:

Under the laws of this state, you must now determine which of the said penalties shall be imposed on the defendant.

In determining which penalty is to be imposed on defendant, you

1 shall consider all of the evidence which has been received during any part of
 2 the trial of this case [except as you may be hereafter instructed]. You shall
 3 consider, take into account and be guided by the following facts, *if*
applicable:

4 (a) The circumstances of the crime of which the
 5 defendant was convicted in the present proceeding and
 6 the existence of any special circumstance[s] found to be
 7 true.

8 (b) The presence or absence of criminal activity by the
 9 defendant which involved the use or attempted use of
 10 force or violence or the expressed or implied threat to
 11 use force or violence.

12 (c) The presence or absence of any prior felony
 13 conviction.

14 (d) Whether or not the offense was committed while the
 15 defendant was under the influence of extreme mental or
 16 emotional disturbance.

17 (e) Whether or not the victim was a participant in the
 18 defendant's homicidal conduct or consented to the
 19 homicidal act.

20 (f) Whether or not the offense was committed under
 21 circumstances which the defendant reasonably believed
 22 to be a moral justification or extenuation for his conduct.

23 (g) Whether or not the defendant acted under extreme
 24 duress or under the substantial domination of another
 25 person.

26 (h) Whether or not at the time of the offense the capacity
 27 of the defendant to appreciate the criminality of his
 28 conduct or to conform his conduct to the requirements of
 law was impaired as a result of mental disease or defect
 or the affects of intoxication.

(I) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to
 the offense and his participation in the commission of the
 offense was relatively minor.

(k) Any other circumstance which extenuates the gravity
 of the crime even though it is not a legal excuse for the
 crime.

(3 CT 631-633 (former CALJIC 8.84.1) (emphasis added); 14 RT 3681-83.)

The law of the Ninth Circuit forecloses petitioner's claim. In *Bonin v.*

1 *Calderon*, the petitioner challenged jury instructions that “listed the statutory
 2 mitigating circumstances and instructed the jury to consider the listed factors that
 3 were applicable.” *Bonin*, 59 F.3d at 848. The petitioner challenged the instruction
 4 as allowing the jury to consider the absence of numerous possible mitigating
 5 circumstances to be aggravating circumstances. *Id.* The Ninth Circuit held that
 6 “[t]he cautionary words ‘if applicable’ warned the jury that not all of the factors
 7 would be relevant and that the absence of a factor made it inapplicable rather than
 8 an aggravating factor.” *Id.*; *see also Williams v. Calderon*, 52 F.3d 1465, 1481
 9 (9th Cir. 1995) (upholding as constitutional an instruction that read to the jury the
 10 entire list of factors relevant to the sentencing decision, even when some did not
 11 apply given the inclusion of the words “if applicable”). The jury instruction used
 12 at trial did not violate petitioner’s right to a fair, reliable and non-arbitrary penalty
 13 determination.

14 Accordingly, the Court DENIES Claims 11(3), 11(4) and 11(5).

15 **5. Confession coerced by threat of polygraph**
 16 **(Claims 5(D)(14), 27(7)-(8), 27(12) & 28)**

17 In Claims 27(7) and 27(8), petitioner alleges that his confession was coerced
 18 by improper and highly suspect use of a polygraph examination. Petitioner also
 19 argues that his mental state, age and the general circumstances at the time, coupled
 20 with the threat of a polygraph examination, coerced petitioner to confess. In Claim
 21 28, petitioner argues that his conviction should be vacated because his confession
 22 was involuntary and, therefore, his confession was improperly admitted against
 23 him at the guilt and penalty phases of his trial. In Claim 27(12), petitioner argues
 24 that he was denied the opportunity to fully and fairly litigate these challenges to
 25 his confession. The Court denied respondent’s motion for summary judgment on
 26 these claims. (Summary Judgment Order at 86.) In Claim 5(D)(7), petitioner
 27 contends that trial counsel’s failure to discover the true nature and extent of
 28 petitioner’s disabilities caused counsel to forego additional meritorious grounds in

1 support of the motion to suppress, specifically that petitioner was incompetent to
2 confess. In Claim 5(D)(14), petitioner contends that trial counsel unreasonably
3 failed to object to the admissibility of petitioner's confession because it was
4 unreliable and inaccurate due to petitioner's mental impairments. Petitioner also
5 alleges that trial counsel failed to present evidence or argue that damaging
6 admissions about the circumstances of the offense were inconsistent with other
7 evidence.

8 Petitioner does not seem to claim that any problem existed with respect to
9 the waiver of his rights. Instead, he appears to argue that several circumstances,
10 coupled with his young age and mental infirmity, made his confession involuntary.
11 He contends that after being interrogated for some time, he was taken to a
12 polygraph examiner "where he was told the truth would be learned." (Pet. at 142.)
13 Petitioner confessed shortly thereafter without ever taking a polygraph exam.
14 Petitioner argues that the police used the threat of a polygraph exam as an
15 investigative technique designed to elicit a confession. (*Id.*) Moreover, petitioner
16 argues that he confessed because he held a false expectation of leniency.
17 Petitioner claims the police implied that he would be given psychiatric treatment
18 and that he would spend only ten to fifteen years in a mental hospital in exchange
19 for his statement. (Petr's 8/23/08 Brief at 74.)

20 The Court must determine whether petitioner's confession was voluntary.
21 *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) ("Is the confession the
22 product of an essentially free and unconstrained choice by its maker? . . . If it is
23 not, if his will has been overborne and his capacity for self-determination critically
24 impaired, the use of his confession offends due process.") (quoting *Culombe v.*
25 *Connecticut*, 367 U.S. 568, 602 (1961)). The voluntariness of petitioner's
26 confession raises a legal question rather than "one of simple historical fact."
27 *Miller v. Fenton*, 474 U.S. 104, 115-16 (1985); *see also Arizona v. Fulminante*,
28 499 U.S. 279, 287 (1991). The ultimate legal issue of voluntariness differs from

1 “subsidiary factual questions,” for example, “whether in fact the police engaged in
2 the intimidation tactics alleged.” *Miller*, 474 U.S. at 106, 108 n.3, 110-12; *see also*
3 *Rupe*, 93 F.3d at 1444 (“[S]ubsidiary questions, such as the length of the
4 interrogation or defendant’s prior experience with the legal system, are factual
5 matters on which [the Court] defer[s] to the state court”).

6 In considering the voluntariness of petitioner’s confession, the Court must
7 assess “the totality of the surrounding circumstances,” which includes “both the
8 characteristics of the accused and the details of the interrogation.” *Bustamonte*,
9 412 U.S. at 226. The key component of a finding of involuntariness is “police
10 overreaching” or “coercive police misconduct.” *Colorado v. Connelly*, 479 U.S.
11 157, 164 (1986); *see also Hutto v. Ross*, 429 U.S. 28 (1976) (per curium) (“The
12 test is whether the confession was extracted by any sort of threats or violence, [or]
13 obtained by any direct or implied promises, however slight, [or] by the exertion of
14 any improper influence.”) (internal quotation marks and citation omitted). In fact,
15 “[a]bsent police conduct causally related to the confession, there is simply no basis
16 for concluding that any state actor has deprived a criminal defendant of due
17 process of law.” *Id.*

18 Inducements generally serve to invalidate a confession. *See, e.g., Brady v.*
19 *United States*, 397 U.S. 742, 754 (holding that when the accused is “in custody,
20 alone and unrepresented by counsel . . . even a mild promise of leniency [has been]
21 deemed sufficient to bar the confession . . . because defendants at such times are
22 too sensitive to inducement and the possible impact on them too great to ignore
23 and too difficult to assess.”); *see also Williamson v. United States*, 512 U.S. 594,
24 620 (1994) (“[I]n cases where the statement was made under circumstances where
25 it is likely that the declarant had a significant motivation to obtain favorable
26 treatment, as when the government made an explicit offer of leniency in exchange
27 for declarant’s admission of guilt, the entire statement should be inadmissible.”)
28 (Kennedy, J., concurring); *Haynes v. Washington*, 373 U.S. 503, 505-13 (1963)

1 (finding confession involuntary where police promised the accused that he could
2 call his wife after he was booked and told him he would be booked after he gave a
3 signed confession); *but see United States v. Harrison*, 34 F.3d 886, 891 (9th Cir.
4 1994) (noting that the Circuit has held that “the police generally may offer to tell
5 the prosecutor about the defendant’s cooperation and suggest that cooperation may
6 increase the likelihood of a more lenient sentence”).

7 The uncontroverted facts include the following: The police arrested
8 petitioner at his father’s home at two o’clock in the afternoon. (2 RT 430A.) The
9 police Los Angeles for the Long Beach police station an hour later. (2 RT 346A,
10 439A.) The officers arrived with petitioner in Long Beach at twenty minutes to
11 four and interviewed petitioner for thirty-five minutes. (2 RT 348A.) Petitioner
12 agreed to take a polygraph exam. (2 RT 349A, 440A, 441A.) Someone took
13 petitioner to the polygraph office at twenty minutes to five, less than three hours
14 after petitioner’s arrest. (2 RT 441A.) According to the polygraph examiner,
15 petitioner said that understood that he was not required to take a polygraph
16 examination. (2 RT 415A.) The examiner told petitioner what kinds of questions
17 would be asked, such as, “Do you know for sure who caused the death of either of
18 these girls?” and “Did you in any way cause the death of either [of] those girls?”
19 (2 RT 415A, 442A.) Petitioner waived his rights. (2 RT 415A, 442A.) Petitioner
20 confessed. (2 RT 415A-16A, 444A.)

21 Some of the events are disputed. The examiner testified that he told
22 petitioner that he (the examiner) was not there “to BS” petitioner in any way.
23 (2 RT 415A.) However, petitioner testified that the examiner told him that the
24 polygraph was just a formality because the examiner could tell by petitioner’s
25 slumped posture that petitioner was guilty. (2 RT 442A.) Petitioner also testified
26 that “the hint and suggestion” of psychiatric help “was there” if he cooperated.
27 (2 RT 446A.) However, both interrogating officers testified that they did not make
28 any statements to petitioner about him being crazy or needing psychiatric care or

1 help. (2 RT 363A-64A, 495A.) Officer Colette also testified that he and Officer
2 Wren did not tell petitioner that the courts were lenient with people who
3 committed crimes when they were crazy or that those individuals probably would
4 be sent to psychiatric facilities. (2 RT 364A, 495A; *see also* 2 RT 352A (officer
5 testifying that petitioner's ability to call his father was not contingent on a
6 confession, stating "this isn't a deal.")

7 Petitioner has failed to show by a preponderance of the evidence that the
8 officers induced him to confess. *See Johnson*, 304 U.S. at 468 (applying the
9 "preponderance of the evidence" standard on habeas). The only evidence of
10 inducement is petitioner's testimony during a hearing on a motion to suppress
11 petitioner's confession, which took place at the time of trial. The interrogating
12 officers testified at that hearing and disputed petitioner's version of events.
13 Petitioner has not offered any evidence of inducement on habeas and accordingly
14 has failed to met his burden of showing that the officers induced him to confess by
15 implying he would receive treatment, a shorter sentence or both if he confessed.

16 The totality of the circumstances lead to a conclusion that petitioner
17 confessed voluntarily. Petitioner has shown neither inducement nor coercion.
18 *See, e.g., Fulminante*, 499 U.S. at 287-88 (holding that the interrogating officer's
19 promise to protect the defendant from a credible threat of physical violence
20 rendered the confession involuntary); *Culombe*, 367 U.S. at 631-32 (holding
21 confession involuntary where accused was held for four days before confession,
22 questioned every day with the stated intention of obtaining a confession, not
23 advised of his right to remain silent, denied a lawyer even though he requested one
24 and confronted with his wife and daughter at the police station in an encounter that
25 left him sobbing), *Reck v. Pate*, 367 U.S. 433, 440 (1961) (invalidating confession
26 as involuntary where accused was held without adequate food, without counsel,
27 without the assistance of family or friends, incommunicado and physically
28 weakened and in intense pain); *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960)

1 (finding coercion where the prisoner was insane and incompetent at the time of
2 confession and where the interrogation lasted eight to nine hours, the accused was
3 without counsel or an advocate and the sheriff, rather than the accused, composed
4 the confession); *Payne v. Arkansas*, 356 U.S. 560, 561 (1958) (finding confession
5 involuntary where “a mentally dull 19-year-old youth” was arrested without a
6 warrant, not advised of his rights to remain silent or to counsel, held for three days
7 without counsel or an advisor, prohibited from making a phone call, denied food
8 for long periods of time and told by the chief of police that if he confessed, the
9 police would attempt to protect him from an angry mob), *overruled on other*
10 *grounds by Fulminante*, 499 U.S. at 310; *Watts v. Indiana*, 338 U.S. 49, 53-54
11 (1949) (holding that solitary confinement for the first two days following arrest,
12 coupled with interrogation for five nights, intermittent daytime interrogations, no
13 hearing before a magistrate, no advisement of constitutional rights, no counsel or
14 professional aid and inadequate rest and food resulted in a confession secured
15 “through the pressure of unrelenting interrogation”); *see also Culombe*, 367 U.S. at
16 584 622 (cataloguing the kinds of factual scenarios that support a finding of
17 involuntariness, including physical brutality, threats of physical brutality, “terror-
18 arousing” interrogation, the shuttling of prisoners from jail to jail, torture, sleep
19 deprivation, starvation, threat of a lynch mob or “gruel[ing], intensely unrelaxing
20 questioning over protracted periods”).

21 Because “coercive police activity is a necessary predicate to the finding that
22 a confession is not ‘voluntary’ within the meaning of the Due Process Clause of
23 the Fourteenth Amendment,” petitioner’s claim fails. *Connelly*, 479 U.S. at 167.
24 Petitioner’s argument that his mental state and age at the time of the confession
25 militate in favor of a finding of involuntariness also fall short. “[W]hile mental
26 condition is surely relevant to an individual’s susceptibility to police coercion,
27 mere examination of the confessant’s state of mind can never conclude the due
28 process inquiry.” *Connelly*, 479 U.S. at 165. Petitioner has failed to show

1 coercion by the police, a necessary predicate to relief.

2 In addition, petitioner's claim of IAC fails. Petitioner has not put forth any
3 evidence that his mental condition prevented him from confessing voluntarily, or
4 that his condition resulted in an unreliable or inaccurate confession. Counsel,
5 therefore, was not deficient for failing to argue that petitioner's mental deficiencies
6 resulted in an inaccurate or unreliable confession. Furthermore, without evidence
7 that petitioner was too mentally infirm to make a valid confession, an argument
8 that the confession was invalid on that basis, likely would have failed.

9 In Claim 27(12), petitioner alleges that "[i]n the proceedings below, [he]
10 was not given an opportunity to full and finally litigate these issues, which call
11 into question petitioner's confession and the veracity and credibility of the lead
12 investigator" fails. (Pet. at 143.) Petitioner litigated this issue in the trial court at a
13 hearing on the motion to suppress his confession. Petitioner and the interrogating
14 officers testified at the hearing. Petitioner has failed to allege in what way the
15 hearing was incomplete or unfair. His conclusory allegations do not warrant relief.
16 *Jones*, 66 F.3d at 204-05 (holding that conclusory allegations without specific
17 factual allegations are insufficient to support habeas relief); *cf. Allison*, 431 U.S.
18 63, 75 n.7 (1977) ("[T]he petition is expected to state facts that point to a real
19 possibility of constitutional error.") (citation and internal quotation marks
20 omitted).

21 Accordingly, the Court DENIES Claims 5(D)(7), 5(D)(14), 27(7), 27(8),
22 27(12) and 28.

23 **6. Prosecutorial and police overreaching (Claims 27(10) &** 24 **27(13))**

25 In Claims 27(10) and 27(13), petitioner contends that prosecutorial and
26 police overreaching resulted in his unfair conviction.

27 Specifically, petitioner contends in Claim 27(10) that the "police and
28 prosecution failed to provide trial counsel with policy reports, investigation

1 reports, crime lab reports, and other pertinent and perhaps exculpatory
2 documentation after their initial production of material to trial counsel, despite
3 their continuing obligation to do so.” (Pet. at 143.) In Claim 27(13), petitioner
4 alleges that the “overreaching of the police and prosecution is further evidenced by
5 the destruction of some forensic evidence and documentation, including a number
6 of test tubes.” (Pet. at 144.) Petitioner fails to point to the reports and exculpatory
7 documentation the police and prosecution failed to turn over. He also fails to
8 allege what test tubes were destroyed. Petitioner’s conclusory allegations cannot
9 support habeas relief. *Jones*, 66 F.3d at 204-05 (holding that conclusory
10 allegations without specific factual allegations are insufficient to support habeas
11 relief). Moreover, “the petition is expected to state facts that point to a real
12 possibility of constitutional error.” *Allison*, 431 U.S. 63, 75 n.7 (1977) (citation
13 and internal quotation marks omitted).

14 Accordingly, the Court DENIES Claims 27(10) and (13).

15 **7. Instructional error (Claim 30)**

16 It is unclear what petitioner seeks in Claim 30. It appears that petitioner
17 argues one of two things. Most simply, he may argue that he is entitled to a new
18 penalty phase trial if the Court grants penalty phase relief. Alternatively, he may
19 bring a substantive claim that he is entitled to a new penalty phase trial because the
20 California Supreme Court invalidated one of his multiple murder special
21 circumstances, and the jury’s erroneous consideration of two multiple murder
22 special circumstances—coupled with jury instructions that included language that
23 the jury “shall” impose death if the aggravating circumstances outweighed the
24 mitigating circumstances—violated his Eighth and Fourteenth Amendment rights.

25 In denying summary judgment to respondent on this claim, the Court read
26 the claim as petitioner asking for a new penalty phase trial if the Court grants
27 penalty relief to petitioner. The relevant part of the order states:

28 First, the claim will not become relevant until and unless the

1 Court vacates one of the petitioner's convictions. The Court can
2 address the claim at that time. Second, petitioner's claim is supported
3 by common sense. The jury decided to impose the death penalty
4 based on the circumstances of the crime and the special circumstances
5 found to be true. If petitioner's conviction for one of the murders,
6 rapes, or sodomies was overturned, it is reasonably likely that the
7 jury, without the evidence of one or more of those crimes presented to
8 them, would not have voted to impose a death sentence. Even though
9 he is under two separate death sentences, the evidence of the crimes
10 was introduced in one trial and the jury relied on the evidence of two
11 murders, two rapes, and two sodomies to vote for the death penalty.
12 It is difficult to state with certainty that the jury would have made the
13 same decision had it been presented with only one set of crimes.
14 Finally, petitioner's claim is intelligible. While he presents no
15 authority to support the request, it is clear what he is asking for—a
16 new penalty trial if any of his convictions are overturned.

17 (Summary Judgment Order at 90.)

18 It seems however, that petitioner meant to make a more nuanced argument
19 advanced in the briefing filed on August 23, 2007. The crux of petitioner's
20 contention appears to be that (1) because the California Supreme Court invalidated
21 one of the multiple murder special circumstances found true by the jury *and* (2)
22 because the trial court gave the jury an instruction that appeared to require the jury
23 to impose the death penalty if the aggravating factors outweighed the mitigating
24 factors by using "shall" language, petitioner is entitled to a new penalty phase trial.

25 In support of this argument, petitioner relies on several sources. First, he
26 points to the jury instructions issued at trial. The jury received CALJIC No.
27 8.84.1, which tracks California Penal Code 190.3, the California death penalty
28 statute. (3 CT 682-83.) The jury also received a modified version CALJIC
8.84.2.1, which stated:

It is now your duty to determine which of the two penalties,
death or confinement in the state prison for life without possibility of
parole, shall be imposed on the defendant.

After having heard all of the evidence, and after having heard
and considered the arguments of counsel, you shall consider, take into
account and be guided by the applicable factors of aggravating and

1 mitigating circumstances upon which you have been instructed.

2 If you conclude that the aggravating circumstances outweigh
3 the mitigating circumstances, you *shall* impose a sentence of death.
4 However, if you determine that the mitigating circumstances
5 outweigh the aggravating circumstances, you *shall* impose a sentence
6 of confinement in the state prison for life without possibility of
7 parole.

8 (3 CT 684-85 (emphasis added).) Petitioner argues that the instructions gave the
9 jury the impression that it had to mechanically weigh the aggravating factors
10 against the mitigating factors and that it had no choice but to impose the death
11 penalty if the aggravating factors outweighed the mitigating factors.

12 In *Boyde v. California*, the Supreme Court held that the very same “shall”
13 language used during petitioner’s trial did not violate the Eighth Amendment. 494
14 U.S. 370, 376-77 (1989). The Court held that *Bylstone v. Pennsylvania*, 494 U.S.
15 299 (1990), decided the same term, foreclosed petitioner’s claim in *Boyde*.
16 *Boyde*, 494 U.S. at 377. “In *Bylstone*, [the Supreme Court] rejected a challenge to
17 an instruction with similar mandatory language, holding that ‘[t]he requirement of
18 individualized sentencing in capital cases is satisfied by allowing the jury to
19 consider all relevant mitigating evidence.’” *Boyde*, 494 U.S. at 377 (quoting
20 *Bylstone*, 494 U.S. at 307). The Supreme Court held that “there is no
21 constitutional requirement of unfettered sentencing discretion in the jury, and
22 States are free to structure and shape consideration of mitigating evidence ‘in an
23 effort to achieve a more rational and equitable administration of the death
24 penalty.’” *Boyde*, 494 U.S. at 377 (quoting *Franklin v. Lynaugh*, 487 U.S. 164,
25 181 (1988) (plurality opinion)).

26 In accordance with *Boyde*, and as admitted by the parties, the penalty phase
27 instructions used at petitioner’s trial allowed the jury to consider mitigating
28 evidence. (3 CT 682-85.) Moreover, a review of the closing arguments shows that
both the prosecutor and defense counsel discussed a number of things the jury
should consider in making its decision, implying that the process did not involve a

1 straightforward, mechanical comparison of the weight of the mitigating factors
2 against the weight of the aggravating factors.¹²

3 A review of the transcript is not dispositive in this case, however. Petitioner
4 not only challenges the mandatory “shall” language in the instruction, but also the
5 instruction’s language *combined with* the improper consideration by the jury of
6 two multiple murder special circumstances, one of which the California Supreme
7 Court invalidated on appeal. *Hernandez*, 47 Cal. 3d at 357. In finding error but no
8 prejudice, the California Supreme Court concluded as follows: “The jury was not
9 told to mechanically count up aggravating factors. It was not confused as to the
10

11
12 ¹² The prosecutor emphasized the importance of each juror’s diverse philosophies, views
13 and experiences in the deliberative process. (14 RT 3625, 3626, 3627, 3628-29, 3630, 3633.)
14 While the prosecutor repeated the “shall impose” language contained in CALJIC 8.84.2, the
15 prosecutor also stated that the decision between the death penalty and life imprisonment was not
16 an automatic one. (*Id.* at 3628 (“We have decided that it would not be automatic. We, as a
17 society, have stated it will not be life without parole, it will not be death. It is not an automatic
18 decision.”).) The prosecutor explained to the jury that, “It is not based upon general
19 philosophies of an individual as to what the ultimate punishment, the ultimate protection of
20 society, or the ultimate deterrents in general. We have, in selecting the representatives of our
21 community to decide this, told them you decide it as to this individual, as to what the ultimate
22 punishment shall be, the ultimate protection shall be, or the ultimate deterrent shall be as to this
23 person.” (*Id.* at 3628-29.) The prosecutor also stated, “Depending upon the cultural
24 backgrounds, philosophical views, religious attitudes, thoughts concerning psychiatry, thoughts
25 concerning religion, thoughts concerning sociological theories, behavior motivation, things like
26 this, decide based upon certain circumstances what is an aggravation and what is a mitigation,
27 and then, if one outweighs the other, impose one or the other of the ultimate sentences.” (*Id.* at
28 3630.) The prosecutor also asked the jury, “In this particular case, should this defendant be
given life without possibility of parole, as requested by the relatives and friends of the defendant,
the hope that he may become a contributing member of society some day? Should you end all
hope with the death penalty?” (*Id.* at 3640.) He continued, “There are various
philosophies—protection, deterrence, punishment. We have a wide variety of philosophies in
our society. Depending on how you view these factors, as applied to this defendant, you decide.
What should you do?” (*Id.*)

23 Defense counsel tried to appeal to each individual juror. He stated, “What happens is
24 you have your own individual conscience You don’t represent the community at all. What
25 you do, you represent each one of you individually, and when each one of you—or if each one of
26 you decides that Frances Hernandez should die, then each one of you has to be responsible for
27 that decision.” (*Id.* at 3655.) He continued, “You have to live with the decision that you
28 individually made for the rest of your lives. There is no way that you can avoid that.” (*Id.* at
3670; *see also id.* at 3671 (“It is a decision which is your own individual determination which
you have to live with for the rest of your lives.”).) He emphasized that each juror was “one
hundred percent responsible for the decision” he or she would make, and that it took a
unanimous decision by all twelve jurors to impose the death penalty. (14 RT 3656, 3656-66.)
Defense counsel concluded by urging the jury to find that the mitigating circumstances
outweighed the aggravating circumstances. (*Id.* at 3671, 3673.)

1 number of victims. It is inconceivable that finding true one more multiple-murder
2 special circumstances than was strictly correct had any influence on the outcome
3 of the deliberations at the penalty phase.” *Id.*

4 Petitioner takes issue with the state court’s finding that the error did not
5 cause him prejudice. He cites to *Daniels v. Woodford*, in which the Ninth Circuit
6 found prejudice from the very error in petitioner’s case, namely, the erroneous
7 consideration of two multiple murder special circumstances together with the
8 “shall” jury instruction used in petitioner’s case. 428 F.3d 1181, 1212-14 (9th Cir.
9 2005). The Circuit found that because of the mandatory language requiring the
10 imposition of the death penalty if the jury found that the aggravating factors
11 outweighed the mitigating factors, the so-called “double counting error” was not
12 harmless. *Id.* at 1214 (“As the Supreme Court has noted, when the sentencing
13 body is told to weigh an invalid factor in its decision, a reviewing court may not
14 assume it would have made no difference if the thumb had been removed from
15 death’s side of the scale.”) (internal quotation marks and citation omitted). The
16 Ninth Circuit concluded that “[w]hen coupled with other penalty phase
17 errors . . . the trial court’s failure to instruct the jury that it could not double count
18 the multiple-murder special circumstance gave the jury one more improper reason
19 to tip the scales against [petitioner].” *Daniels*, 428 F.3d at 1214. *Daniels* held that
20 the cumulative prejudice of the “double counting” error along with the “shall”
21 language in the jury instruction and other penalty phase errors “so infected the
22 [proceedings] with unfairness as to make the death sentence invalid.” *Id.* at 1214
23 (internal quotation marks and citation omitted). The extra multiple murder special
24 circumstance coupled with the use of the mandatory language in the jury
25 instructions amounted to a constitutional error in petitioner’s case. *Daniels*, 428
26 F.3d at 1212-14. It is likely that the combined error caused at least some prejudice
27 to petitioner, but the impact of the error is part of a cumulative error analysis. *Id.*
28 (finding cumulative error).

1 Accordingly, the Court DENIES Claim 30 but will consider this error in the
2 cumulative error analysis.

3 **8. Cumulative error**

4 The Court also must consider the cumulative effect of the constitutional
5 errors that occurred at petitioner's trial. *United States v. Frederick*, 78 F.3d 1370,
6 1381 (9th Cir. 1996) (citing *United States v. Green*, 648 F.2d 587, 597 (9th Cir.
7 1981)); *see also Kwan Fai Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992) (per
8 curiam) ("We need not [] decide whether these deficiencies alone meet the
9 prejudice standard because other significant errors occurred that, considered
10 cumulatively, compel affirmance of the district court's grant of habeas corpus as to
11 the sentence of death."); *Harris*, 64 F.3d at 1439 ("By finding cumulative
12 prejudice, we obviate the need to analyze the prejudicial effect of each
13 deficiency."). While counsel's deficient performance at the penalty phase and
14 several instances of juror misconduct entitle petitioner to relief, the Court also
15 finds that the cumulative effect of these errors, along with the penalty phase
16 instructional error raised in Claim 30, caused petitioner unconstitutional prejudice
17 at the penalty phase. Counsel's deficiencies resulted in an incoherent hodgepodge
18 of mitigating evidence that failed to present evidence of petitioner's poor start in
19 life, his unfortunate circumstances growing up and his serious mental and
20 neurological deficiencies. In addition, one juror consulted her minister during
21 penalty phase deliberations and was advised to elevate petitioner's potential for
22 rehabilitation over all other considerations. Some of the jurors who deliberated at
23 the penalty phase were exposed to a newspaper article linking petitioner to two
24 strangulation murders similar to those for which he faced the death penalty.
25 Petitioner did not commit the murders. Also before penalty phase deliberations
26 concluded, an alternate juror informed the foreman that petitioner was accused of
27 committing another uncharged rape. Finally, the trial court instructed the jury that
28 it shall impose the death penalty upon finding that aggravating circumstances

1 outweighed mitigating circumstances *and* the jury improperly considered two
2 multiple murder circumstances, one of which was vacated on appeal. These
3 combined errors resulted in a constitutionally infirm penalty phase trial. *See Parle*
4 *v. Runnels*, 505 F.3d 922, 927 n.6 (“In analyzing prejudice in a case in which it is
5 questionable whether any single trial error examined in isolation is sufficiently
6 prejudicial to warrant reversal, [the Ninth Circuit] has recognized the importance
7 of considering the cumulative effect of multiple errors and not simply conducting a
8 balkanized, issue-by-issue harmless error review.”) (internal quotation marks and
9 citations omitted); *see also Daniels v. Woodford*, 428 F.3d 1181, 1214 (9th Cir.
10 2005) (“Errors that might not be so prejudicial as to amount to a deprivation of due
11 process when considered alone, may cumulatively produce a trial setting that is
12 fundamentally unfair.”) (internal quotation marks omitted).

13 Accordingly, the Court GRANTS petitioner’s claim of cumulative error at
14 the penalty phase.


15 **III. Order**

16 1. For the foregoing reasons, the Court hereby **GRANTS** the petition
17 for writ of habeas corpus on the basis of Claims 4(A)(1), 4(A)(7)(d), 4(A)(2),
18 4(A)(3), 5(C)(7), 5(D)(27), 5(D)(32), 5(D)(40) and cumulative error. The Court
19 orders that the sentence of death in the matter of *People v. Francis Hernandez*,
20 Case No. A-022813 in the California Superior Court for the County of
21 Los Angeles, be **VACATED**.

22 2. All other claims are **DENIED**.

23 **IT IS SO ORDERED.**

24 Dated: August 16, 2011.

25
26 
27 _____
28 Ronald S. W. Lew
United States District Judge

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